

# THE U.S. SENTENCING COMMISSION AND COCAINE SENTENCING POLICY

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## HEARING

BEFORE THE

## COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

ON

EXAMINING U.S. SENTENCING COMMISSION RECOMMENDATIONS FOR  
COCAINE SENTENCING

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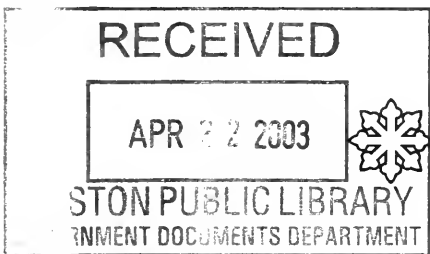
AUGUST 10, 1995

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**Serial No. J-104-40**

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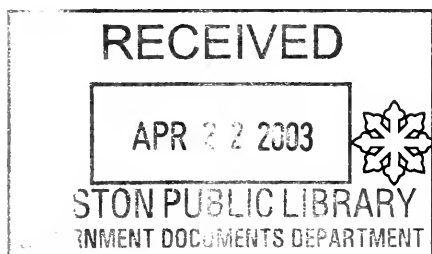
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# THE U.S. SENTENCING COMMISSION AND COCAINE SENTENCING POLICY

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THURSDAY, AUGUST 10, 1995

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The committee met, pursuant to notice, at 10:42 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (Chairman of the committee), presiding.

Also present: Senators Thompson, Kennedy, and Feinstein.

The CHAIRMAN. I apologize for starting this so late. Once again, I made a terrific mistake in thinking that the Senate might act expeditiously on anything and, of course, it was a terrific mistake, so I apologize. I should have just come right over here about 10:05 when we had our last vote. They said it would be a vote immediately after that and, of course, it didn't turn out that way. So, please forgive us. We will go ahead.

## OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

The CHAIRMAN. Today, the Judiciary Committee will examine the proposal of the U.S. Sentencing Commission to lower penalties for crack cocaine to the same level as those for powder cocaine.

Sentencing policy is a very complex subject, bringing many factors and disciplines into play. In pursuit of a certain and effective sentencing policy, Congress must study different sentencing approaches, seeking a broad spectrum of input. In so doing, we explore fundamental questions of justice.

No one questions whether crack has had a devastating effect on our cities, on their predominantly minority residents, and on the poor. The question before us today is whether crack penalties should be lowered. I am not persuaded that they should be at this point, but I am willing to listen carefully here today. A related question is whether it really makes sense to punish crack dealers and traffickers more than other drug offenders. Personally, I believe that it does.

Determining the proper sentence for crack offenses has provoked considerable debate. One thing is certain, crack cocaine is a killer drug which is far more related to inner-city violence than any other single drug, and it is more addictive than powder cocaine.

The Sentencing Commission's own report notes that crack produces far more intense psychoactive effects than powder cocaine, reaching the brain in just 19 seconds, compared to 20 minutes or more for snorted powder. Crack's more intense high is also more

fleeting, leading users to want more cocaine with greater and greater urgency.

Street violence due to cocaine increased significantly after the introduction of crack during the mid-1980's. The instances of prostitution among women who use crack rose sharply as well. Women, incidentally, make up fully one-third of all crack users. Unfortunately, the word on the street was that crack made for easier pregnancies, and before long we started to hear reports of premature babies being born in inner-city hospitals, babies who were underdeveloped and who didn't like being touched.

Crack is now entrenched in the urban landscape. In Washington, DC, our capital city, hardly a week goes by without a story tucked in the back of the Metro Section about a multiple murder. It is almost always drug-related, almost always crack-related.

The District's crack dealers are notorious for raising violent drug trafficking to new extremes. Our witnesses and visitors here today may remember the trial last year of the District's First Street Crew. The trial was marked by the shooting of 11 witnesses, 5 of them fatally, as traffickers attempted unsuccessfully to intimidate those testifying against them.

The brunt of crack's social consequences continues to fall on poor urban minority residents. Cocaine-driven emergency room admissions for African-Americans are at historic high levels and are running at 900 percent above the rate for the population as a whole.

One key point that I want to clear up before we even get started is this notion that crack penalties are 100 times more severe than powder sentences. Crack sentences are, in fact, between two and six times longer than sentences for a comparable quantity of powder cocaine.

For instance, if two defendants are arrested, one with 50 grams of crack, the other with 50 grams of powder, the crack dealer can expect a sentence of 10 years, which is roughly six times longer than the powder cocaine defendant. At higher offense levels, the differential shrinks to 2 to 1.

The principle of applying different penalties for related offenses is not new. We sentence criminals to up to 5 years for interstate car theft, but up to 15 years for car-jacking, even if no injury results. Selling obscene materials carries a potential 5-year sentence, but if the obscene materials involve children, the penalty is up to 15 years. Differentials exist in the drug area as well. Smokable methamphetamine, or ice, is penalized at 10 times the rate of regular methamphetamine, and almost as severely as crack cocaine.

In closing, we must be careful when debating sentencing policy that, in the interest of fairness, we do not unintentionally cater to the interests of wrongdoers at the expense of the law-abiding public. Congress must not allow itself to lose sight of its principal constituency; that is, the law-abiding citizen, whose confidence in our criminal justice system must be restored. We must not become so intimidated by inflammatory claims that our sentencing policy fails to support our most vulnerable citizens, especially those living in our violent and drug-ridden cities who have equal rights to safe neighborhoods.

If I could, I would like to put up just three charts. Chart No. 1 shows the differences between the offense characteristics of crack



offenders and powder cocaine offenders. On the left side of the chart, almost twice as many crack defendants were carrying weapons as powder defendants. On the right side of the chart, nearly three times as many crack offenders were a part of the highest criminal history category under the sentencing guidelines. This underscores the fact that crack is more violence-prone.

Let me go to chart No. 2. This chart shows that, unlike powder cocaine offenders, crack cocaine offenders are often mid-level or street-level dealers rather than mere mules or couriers. So you can see the defendant's function in trafficking organizations. I think those graphs are very powerful.

Let me go to chart No. 3. This chart shows the Sentencing Commission's conclusion that crack defendants are almost twice as likely to have a recent criminal history at the time of their arrest as powder defendants.

I think those charts are very interesting, and those facts are very interesting as well.

Now, let me just say before we move to Ms. Harris, Assistant Attorney General Jo Ann Harris has announced that she will be leaving the Department of Justice in the fall. Personally, we are going to miss you. We think you have served the Department very well, and I want to compliment you for the efforts that you have put forward.

Ms. HARRIS. I appreciate that.

The CHAIRMAN. We will take your testimony at this time.

**STATEMENT OF JO ANN HARRIS, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC**

Ms. HARRIS. Mr. Chairman and members of the committee, thank you for the chance to discuss with you sentencing of offenders who violate Federal laws relating to crack cocaine.

The U.S. Sentencing Commission, by a 4-to-3 vote, has taken action to try to equalize penalties for trafficking in crack by reducing them to the much lower current powder cocaine levels. The Department of Justice opposes the Commission's action. We have submitted a legislative proposal to override the Commission's amendments and we urge Congress to act quickly to prevent these amendments from taking effect November 1.

Our reason for urging this action is two-fold. First, we believe that equalization is counter to good law enforcement policy. This is because crack is quite simply the more dangerous form of the drug. That is not to say, however, that the question of appropriate penalties for crack and powder cocaine do not warrant review.

But, and this is my second point, if, after a careful review, Congress concludes that some change in the ratio is appropriate, it is essential that a statutory change in the relevant mandatory minimums comes before any guideline changes.

I will explain each of these concerns in greater detail, but before doing so, let me say I want to commend the U.S. Sentencing Commission and the Commissioners for its special report to the Congress entitled "Cocaine and Federal Sentencing Policy." It is a valuable resource for your study. In its report, the Commission concludes that there are substantial differences between crack and co-

caine powder, and that crack is associated, as you have noted, Mr. Chairman, with more societal harms than cocaine.

The Department of Justice is concerned that lowering the penalties for crack trafficking to equal those for cocaine powder does not reflect these significant differences. It does not recognize the impact crack has had on our communities. It does not begin to consider the effect such a drastic change in penalties would have on deterring those who traffic in this dangerous drug.

However, as we have said repeatedly, we believe a review of the current penalty structure is appropriate. We have done our level best to work with the Commission on this subject, and we will look forward to working with this committee, with Congress and, if appropriate, again with the Commission in their review.

Let me explain why crack is a more dangerous drug than cocaine powder. It has to do with both the crack market and the effects of crack on the user. Because crack, unlike cocaine powder, is typically broken down and packaged into very small and inexpensive quantities for distribution, it has become readily available to a large segment of our population, including those most vulnerable—the poor and the young.

In addition, because it is typically smoked, crack is easy to use, which makes it attractive to potential buyers targeted by traffickers. The ability to sell small quantities of crack has led to street-based marketing patterns heavily associated with violence. Since crack dealers tend to use young people to distribute the drug, the violent crack culture is being transmitted to our youth.

I will turn now to the effects of crack and cocaine powder use for just a minute, if I may. The difference in the most common routes of administration between crack and cocaine powder makes crack the more harmful substance and a very dangerous one, even in small quantities.

Crack is smoked, as I have noted, while cocaine powder is typically snorted. Smoking crack produces a more intense, more quickly achieved euphoria than snorting cocaine powder, but one that is shorter in duration. This short but intense high makes the user more likely to administer the drug frequently and in binges. In short, crack is more psychologically addictive than powder cocaine.

I must say that our conclusions with respect to the dangerousness of crack are very similar to those—in fact, virtually the same as those reached by the Sentencing Commission in its own report. In spite of this, as I have noted, the Sentencing Commission recently has taken two steps to drastically lower crack penalties.

First, the Commission recommended that Congress eliminate the differences reflected in the statutory mandatory minimums in place at this time. In addition, the Commission has promulgated an amendment of the sentencing guidelines that would treat crack and cocaine powder alike under the guidelines, regardless of whether Congress first revises the statutory minimum penalties.

The Commission's proposal would reduce crack trafficking penalties to extremely low levels. For instance, if the Commission's combined actions were to be accepted, an offender convicted of distributing 50 grams of crack—that is about 500 doses—for whom the current law imposes a mandatory minimum 10-year term of imprisonment, the same person would face a guideline sentence of

just 12 to 18 months of imprisonment after accepting responsibility for the offense.

Indeed, some offenses now subject to the 5- and 10-year mandatory minimum prison terms could potentially result in a sentence involving no required prison term at all. The message to crack traffickers would be to expand their operations in response to a wind-fall reduction in the cost of doing business.

Further, there are problems caused by the process of moving forward with a sentencing guideline amendment without first obtaining a statutory change. The statutory minimum sentences will override many of the guideline sentences and produce very sharp sentencing cliffs.

For example, one-tenth of a gram of crack could make the difference between a guideline sentence of 6 months of imprisonment and a 5-year mandatory minimum term. This is because guidelines inconsistent with the mandatory minimums simply will cause huge clumps of sentences around mandatory minimums. Big traffickers at the high range where mandatory minimums are not in play will be the benefactors, and I am sure that no one wants that result. The sentencing guidelines should work in concert with, rather than opposition to, mandatory minimum sentences.

If I may continue, there is one thing that I do want to address that may arise here when the Sentencing Commissioners have their panel, and it is this. One of the concepts, I think, driving the Commission's majority is the belief that crack's greater dangers can be captured through the use of guideline enhancements targeted to particular harms that are associated with some crack offenses—harms such as sale to juveniles and the use of violence.

Along with the minority Sentencing Commissioners, we believe that the systemic harms that are associated with this form of the drug simply cannot be captured in specific offense characteristics. The Commission's approach ignores the fact that more culpable defendants will be able to successfully shield themselves from those enhancements and from association with the aggravating factors.

For instance, someone on the street may very well be arrested for possession of guns and people much more culpable will be charged, but we will not be able to capture the enhancement of violence in crack sentencing for those more culpable people because we will not be able to prove it.

So we really think that it is important that the sentencing structure reflect the systemic harms that are caused by this more dangerous form of the drug. We have submitted a legislative proposal, and our proposal, incidentally, will not affect the Commission's guideline amendment relating to simple possession offenses. We are talking about trafficking in crack.

I must emphasize that time is of the essence. November 1 is the time at which the Commission's sentencing guideline amendments will become effective unless Congress takes the action that we have suggested.

We are here to work with you, with the Commission, with Congress, and I would be pleased to answer any questions you may have.

The CHAIRMAN. Well, thank you, Ms. Harris. We appreciate you and appreciate your testimony here today.

Let me get to the bottom of this question of who is the typical crack dealer imprisoned by the Federal Government. The Sentencing Commission reports that the median crack trafficker is someone who is convicted of selling 109 grams of crack. Now, that is the equivalent of more than 2,000 rocks, as I understand, and as the chart to my right indicates, the Sentencing Commission's recent report adds that crack offenders are more likely to carry weapons than other traffickers and are more likely to have more extensive criminal records.

That second chart that I had pointed out that, according to the Sentencing Commission statisticians, out of 3,430 crack defendants in 1994, the number of youthful small-time crack offenders with no prior criminal history and no weapons involvement and sentenced in Federal court was just 51, of whom 48 were minorities. That is out of 3,430. Only 10.2 percent of crack defendants possessed less than 2 to 3 grams of crack, which was the equivalent of 40 to 60 doses of crack cocaine.

Ms. HARRIS. That is correct.

The CHAIRMAN. Now, my first question is, is this an accurate description of the typical Federal crack offender based upon the information at your disposal.

Ms. HARRIS. I think it is. Because each case is different and the way that things are recorded are different, it is very hard to describe the typical crack defendant, but let me say this. In the main, in the Federal courts, crack defendants are traffickers in amounts of crack that are what I regard as dangerous to the community and in large enough quantities to really be the kind of defendant that I think anybody would want to see put in prison.

The CHAIRMAN. Now, just so we make it clear here today, does the Department of Justice support mandatory minimum sentences for drug traffickers, and if so, why?

Ms. HARRIS. For really bad traffickers, mandatory minimums are, we believe, important to simply send the message that there is a bottom to a sentence that is addressed to the harm that is caused by the drug.

The CHAIRMAN. Does the Department of Justice support lowering penalties for any category of crack trafficker?

Ms. HARRIS. If we are dealing with traffickers, we do not support lowering the penalties.

The CHAIRMAN. So you would keep them where they are?

Ms. HARRIS. Well, let me put it this way. I have said before as far as the review of the overall cocaine-crack structure, we believe that that could warrant review, and we have said that repeatedly, Mr. Chairman. There are many, many models that might very well serve law enforcement purposes, many, many structures that might well serve law enforcement purposes.

Let me put it another way. Our position is that crack is the more dangerous form of the drug; that to lower those sentences dramatically would send the wrong message. But that said, I think that as a matter of public policy, Congress should always be reviewing the penalty structures, and we think it would be appropriate to review the structure in these instances.

The CHAIRMAN. Now, am I correct in believing that there are approximately 15,000 crack offenders who are currently serving prison sentences in the Federal system?

Ms. HARRIS. I think you are about right. Our estimates are from 10,000 to 12,000.

The CHAIRMAN. So somewhere between 10,000 and 15,000 are actually serving right now?

Ms. HARRIS. Yes, that is fair.

The CHAIRMAN. Even if the guidelines are not expressly applied retroactively, do you believe it possible that inmates will sue to have their sentences reduced on that basis, and if so, what kind of an effect will an increase in lawsuits of this type have on the Department of Justice's capabilities and resources?

Ms. HARRIS. Mr. Chairman, every time that there is uncertainty, ambiguity, change in the law—every time that there is the opportunity for a defendant to make an argument in the court that some action relating to his offense, his sentence, has changed causes a litigation—"explosion" might be a strong word, but certainly an increase in litigation over matters that, of course, take the time of assistant U.S. attorneys in cases where we have already rightly and justly gotten a conviction and a sentence. So every time something is reviewed takes our resources away from fighting crime.

The CHAIRMAN. Well, thank you. I will turn to Senator Feinstein at this time.

#### STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you, Mr. Chairman. I want to thank you for holding these hearings and say that I agree very much in whole with what you have said. I have seen crack cocaine up close, and hard and dirty. I have seen it destroy neighborhoods. I believe it is synonymous with guns, gangs, violence. It is easy to make. It can be made in anyone's kitchen. It is easy to sell and it is easy to addict. It has a very high profit margin because a small amount of cocaine can make a much larger amount of crack. I have seen it literally destroy huge neighborhoods. I have seen particularly women who have been addicted the first time they use crack.

So I very strongly believe that this is not the time to reduce sentences. I believe that cocaine is coming into this country in amounts that we have never before seen, and to have cocaine that can be bought in small amounts and turned into a much larger amount of rock crack and sold on the streets—you know, I remember when I was mayor, youngsters would say to me, why should I take a minimum-wage job when I can be a look-out for the crack dealer in my area and make 5 times the amount of money just standing on my corner. This is what it is doing in communities.

So I just want to say to Ms. Harris and to the Department of Justice that I want to thank you very much for standing up to what is reality on the streets of our cities, and it is a very serious reality, indeed. So I want to say thank you for your comments and indicate that I really agree with them.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Senator Thompson?

STATEMENT OF HON. FRED THOMPSON, A U.S. SENATOR  
FROM THE STATE OF TENNESSEE

Senator THOMPSON. Thank you. As I understand it, the Commission is recommending that we go away from the disparity that is in the base sentence and try to make up for the differences in the two kinds of substances in the guidelines themselves.

It looks to me like you could debate whether it is good or not, but we are going away from the original purpose of the Sentencing Commission, and that is to get away from so much discretion for the judge and to come together and have some agreement that certain of these offenses require at least a certain minimum sentence. If you are going to do away with that and leave everything up to the guidelines and then broaden the guidelines, you are still getting back into a highly discretionary situation with the judge.

I look at these indicators that the court would be looking at, apparently, in order to make up for the disparity and to take into account the increased danger that crack poses—involvement of juveniles or street gangs, drug crime protected location, continuing criminal enterprise.

It looks to me like in order for the prosecution to be in a position to ask the judge to impose additional sentences for crack, they have got a whole lot of hoops they are going to have to jump through and get into an evidentiary hearing type situation where they are going to have to prove a lot of additional offenses, as a practical matter, and a lot of additional factors.

If you catch a guy in a neighborhood with crack cocaine under present circumstances, he is in big trouble. But under these guidelines, there would be no mandatory minimum sentence and then the prosecution would have to prove that he was a part of a street gang or that it was a drug crime in a protected location or that he was a part of a continuing criminal enterprise.

Am I looking at that correctly? I mean, is that a valid concern that, as a practical matter, you are going to really weigh the courts down and prosecution down with having to prove a lot of additional factors before they can be considered by the court in giving the relevant importance that we know that crack cocaine should get?

Ms. HARRIS. Let me say two things. First, you are quite right. Every time a new factor is added to a sentencing calculation, the Government is going to be required to produce evidence of it. A judge is going to have to make a decision, so that every enhancement that is built into the sentencing guidelines is going to require an evidentiary hearing of some kind.

But I would like to take it one step further. Even if we were going to do that, there are a couple of things that trouble me. One is that you can have a culpable defendant who is able to divorce himself from those enhancing factors, so that you simply will not be able to prove against some very culpable defendants the very specific enhancements that are built into the guidelines in an attempt to take into account the differences in the two drugs.

The second thing is that there are things that you simply cannot prove in any case, like the devastation to women and to children, from the ingestion and the use of a drug that is just far more dangerous. That is a systemic harm that you just can't fit into a sentencing proceeding.

Senator THOMPSON. Yes, that seems to be the point. The additional factors that would presumably be in the guidelines have to do with actions or activities that the defendant has taken, and what you are talking about are systemic problems that are inherent in the activity but have nothing to do perhaps with that particular transaction. They are just there in all similar transactions and a greater threat to society.

I was not here in the beginning. Is it the Department's position that no change should be made? Obviously, the 100-to-1 ratio seems to be out of kilter, on the one hand. But to me, basically, what the Sentencing Commission proposes is not equalizing it; it is just lowering the penalty for crack cocaine under the proposal. Is there any reasonable compromise to these positions?

Ms. HARRIS. We believe that any number of penalty structures, as long as they take into account the genuine difference in the harm that this form of the drug is causing in our communities, may very well serve law enforcement purposes. We have said again and again that we believe that the present structure warrants review, and I encourage Congress to conduct that review. I think that these kinds of sentencing policy questions are your business, and we will do everything we can to work with you as you work through these issues.

Senator THOMPSON. I have nothing further at this time, Mr. Chairman.

The CHAIRMAN. Well, thank you, Senator Thompson.

But you have also said that if we lower crack cocaine penalties to anywhere near what powder cocaine penalties are that you are going to just give incentives for them to even expand their businesses.

Ms. HARRIS. I think it will send the wrong message if we drastically lower the crack cocaine penalties, and I just simply believe that—and I have given the example with respect to what we think could happen if they were equalized.

The CHAIRMAN. Well, I want to thank you. I have a great deal of admiration for you. You have done a tremendous job down there at Justice and we wish you well. We hate to see you leave, to be honest with you, because you have served the Department and our country well and we are honored to have you here today. I am sorry you had to wait for me to get here from that vote, but thank you for being with us.

Ms. HARRIS. Thank you very much.

[The prepared statement of Ms. Harris follows:]

#### PREPARED STATEMENT OF JO ANN HARRIS

Mr. Chairman and Members of the Committee: Thank you for the opportunity to appear before you today to discuss sentencing of offenders who violate federal laws relating to crack cocaine.

The Department of Justice strongly opposes the recent action by the United States Sentencing Commission to equalize penalties for trafficking in crack and cocaine powder at the much lower, current levels applicable to powder. To this end we have submitted a legislative proposal to override the Commission's guideline amendments aimed at this purpose and urge Congress to act quickly to prevent the amendments from taking effect November 1, 1995.

Our reason for urging this action is two-fold. First, we believe that equalization is entirely unwarranted and counter to good law enforcement policy. Crack is simply the more dangerous form of the drug. That is not to say, however, that the question of appropriate penalties for crack and powder cocaine does not warrant review. Sec-

ond, if after a careful review, Congress concludes that some change in the ratio is appropriate, it is essential that a statutory change in the relevant mandatory minimums precede the applicable guidelines changes.

The Commission's guideline amendments currently pending in Congress are inconsistent with current statutory minimum penalties. The process employed by the Commission in moving forward with guideline changes that are discordant with the current statutes is in our view wrong—rather, the Commission should first have asked Congress to change the statutes. Moreover, the process employed will produce bad sentences. I shall explain each of these concerns in greater detail.

Before doing so, I would like to commend the United States Sentencing Commission for its Special Report to the Congress, entitled *Cocaine and Federal Sentencing Policy*. It is a valuable resource which I recommend as you study the issue before you. In its Report the Commission concludes there are substantial differences between crack and cocaine powder and that crack is associated with more societal harms than cocaine powder.

The Department of Justice is concerned that equalization of the penalties for crack and cocaine powder trafficking does not reflect the significant differences between the two, the impact crack has had on our communities, and the effect a drastic change in penalties would have on deterring those who traffic in this dangerous drug. We believe, nonetheless, that a review of the current penalty structure is appropriate, and we look forward to working with this Committee and with Congress and, if appropriate, with the Commission in that review.

#### CRACK IS MORE DANGEROUS

##### *The crack market*

Because crack, unlike powder cocaine, is typically broken down and packaged into very small and inexpensive quantities for distribution, it has become readily available to a large segment of our population, including those most vulnerable—the poor and the young. In addition, crack is easy to use, which makes it attractive to potential buyers targeted by traffickers.

The ability to sell small quantities of crack has led to street-based marketing patterns and the development of “crack houses.” Violence is heavily associated with the crack trade, both because of its street-based nature as well as the sheer volume of transactions taking place involving these quantities of crack. As the number of deals increases, so too the probability that any one will result in a dispute. Guns are prevalent on the street and are used freely to protect the trade.

As the Sentencing Commission itself concluded, “crack dealers generally tend to have a stronger association with systemic violence [violence associated with the marketing of a drug] and are more likely to possess weapons than powder cocaine dealers.” *Special Report* at 195. Moreover, crack dealers “tend to use young people to distribute the drug at an increased rate.” *Id.* Thus, the violent crack culture is being transmitted to our youth.

##### *Effects of crack and cocaine powder use*

Because of the way it is consumed, small quantities of crack can be very dangerous. This danger follows from the route of administration of the two drugs: crack is smoked while cocaine powder typically is snorted. This difference in the most common routes of administration makes crack the more harmful form of cocaine.

Smoking crack as compared to snorting cocaine results in significant physiological and psychotropic differences. Those who smoke crack reach maximum physiological effects in approximately two minutes and maximum psychotropic effects in just one minute. In contrast, those who snort cocaine powder reach these effects in 40 and 20 minutes, respectively. Crack that is smoked enters the brain in just 19 seconds, compared to five minutes for cocaine powder that is snorted. *Id.* at 29. Smoking crack is also a more efficient absorption route than snorting powder. *Id.* at 23. However, the duration of effect for crack is shorter than for cocaine powder when snorted: 30 minutes, compared to 60 minutes. *Id.* at 29. Duration of effect is significant because it is related to dependency; because of the short but intense nature of the euphoria induced by crack, the user is more likely to administer the drug frequently and in binges. *Id.* at 28. In summary, crack is more psychologically addictive than cocaine powder.

The Department's conclusions about the harmful effects of crack as compared to cocaine powder are virtually the same as those reached by the Sentencing Commission, which itself concluded: “[T]he higher addictive qualities associated with crack combined with its inherent ease of use can support a higher ratio for crack over powder.” *Id.* at 183.



## SENTENCING COMMISSION'S ACTIONS

On May 1, 1995, the United States Sentencing Commission submitted to Congress amendments to the sentencing guidelines, policy statements, and official commentary that would equalize penalties for cocaine base (which is usually in the form of crack) and cocaine powder. The resulting penalties for crack would be at the current levels for cocaine powder. These amendments, adopted by a 4-3 vote, will take effect November 1, 1995, unless an Act of Congress provides otherwise.

The Sentencing Commission has actually taken two steps to lower crack penalties. First, the Commission has recommended that Congress eliminate the differential treatment of crack and cocaine powder in the mandatory minimum penalties currently provided by statute. In addition, the Commission has promulgated an amendment of the sentencing guidelines to treat crack and cocaine powder alike under the guidelines, both for simple possession and trafficking, regardless of whether Congress first revises the statutory minimum penalties.

#### *Impact on crack sentences*

The Commission's amendments and legislative proposal would reduce crack trafficking penalties to extremely low levels. As a result of the Commission's combined actions, an offender convicted of distributing 50 grams of crack (about 500 doses), for whom the current law imposes a mandatory minimum 10-year term of imprisonment, would face a guideline sentence of 21-27 months of imprisonment. However, unlike a mandatory minimum sentence, the guideline sentence would be subject to reduction for various guideline factors. If the 50-gram trafficker accepted responsibility for his or her offense, the sentencing guideline range would be just 12-18 months of imprisonment. If the court found that the offender had also played a minimal role in the offense, the sentencing guideline range would be reduced to 4-10 months of imprisonment, which could be satisfied by probation with home detention.

In short, if Congress adopts the Commission's recommendation to treat crack and cocaine powder alike for purposes of the mandatory minimum penalties, some offenses now subject to a 5- or 10-year mandatory minimum prison term will potentially result in a sentence involving no required prison term at all. The message to crack traffickers would be to expand their operations in response to a windfall reduction in the cost of doing business.

#### *Problems of guidelines without statutory change*

Even if Congress does not adopt the Commission's recommendation as to mandatory minimum penalties for crack, the sentencing guideline amendments the Commission has submitted create serious problems. The Commission did not make the sentencing guideline amendments contingent upon amendment of the mandatory minimum sentences. Thus, the low guideline sentences that would result from equalization of crack and cocaine powder penalties would create tension between the guidelines and the current statutory scheme, with the result that mandatory minimum sentences will override many guideline sentences and produce sharp cliffs in sentencing. For example, a tenth of a gram of crack could make the difference between a guideline sentence of a half-year of imprisonment (or probation with conditions of confinement) and a five-year mandatory minimum term. Moreover, many sentences that would have been well above the mandatory minimum levels, based on quantity, will be reduced to the mandatory minimum. As a result, distinctions in offense seriousness based on drug quantity will be obliterated in many cases.

In short, by moving forward with guideline amendments without any statutory change to the crack penalty structure, the Commission has put the cart before the horse—with the result that bad sentences will be imposed. The sentencing guidelines should work in concert with, rather than in opposition to, mandatory minimum sentences.

Another effect of the Commission's guideline changes, even in the absence of a statutory change in mandatory minimum crack sentences, is that the low proposed guideline sentences will prevail in the case of crack offenders subject to the "safety-valve" exemption from mandatory minimum sentences, 18 U.S.C. § 3553(f). This will result in sentences below the Congressionally mandated guideline floor of 24 months for safety-valve defendants. Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001(b)(1)(B).

The majority of the Sentencing Commission believes that crack's greater dangers can be captured through the use of guideline enhancements targeted to particular harms associated with some crack offenses—harms such as sales to juveniles and the use of firearms. To this end the Commission has proposed a new enhancement regarding the possession and use of a weapon for all drug trafficking offenses.

Along with the minority, we believe it is not enough to rely on these factors to account for the differences between crack and cocaine powder trafficking in individual sentences. Relying on such enhancements ignores the fact that equally or more culpable defendants will be able successfully to shield themselves from association with the aggravating factors. Many members of an organization benefit from the fact that a few enforcers carry guns. All distributors should be held accountable for the systemic harms characteristic of the crack trade.

Moreover, relying on enhancements for such factors as using a minor or possessing a firearm overlooks the differences in the harms caused by the drugs themselves. A distributor of crack commits a more serious offense than a distributor of an equal amount of cocaine powder, assuming no aggravating characteristics are present, because the drug distributed by the former is more dangerous to the user and is associated with more systemic violence.

#### *Department's legislative proposal*

As you know, the amendments to the sentencing guidelines recently submitted by the Sentencing Commission are subject to a 180-day review period and will take effect November 1, 1995, except to the extent that an amendment is modified or disapproved by Act of Congress. See 28 U.S.C. § 994(p). The Department has submitted a legislative proposal seeking Congressional disapproval of the proposed equalization of crack and cocaine powder guideline sentences applicable to *trafficking* offenses. However, the Department's legislative proposal would not overturn the Sentencing Commission's actions to equalize guideline sentences for *simple possession* of crack and cocaine powder.

It must be emphasized that time is of the essence in enacting legislation to override the Sentencing Commission's equalization guideline amendments. Inattention by Congress to this important matter will mean that the Commission's 1:1 quantity ratio for sentencing crack and cocaine powder offenders will take effect November 1, with all of the negative consequences discussed earlier.

While we urge Congress to adopt our legislative proposal disapproving the Sentencing Commission's guideline amendments, we recognize that the present sentencing structure is not the only one that could vindicate essential law enforcement purposes. We believe that in the future Congress should weigh the policy considerations relating to a particular quantity ratio for the sentencing of crack and cocaine powder trafficking offenses. To do so Congress needs to consider the specific sentencing consequences of any ratio considered. To choose a ratio because it sounds better than the current 100:1 or the Commission's 1:1 is not enough. The Department urged the Sentencing Commission to provide Congress with the sentencing consequences of a number of ratios and to consider the impact of the safety valve within these ratios. We suggested that these models could illustrate the actual penalty impacts of these ratios, depending upon adjustments in the mandatory minimums. Instead, the Sentencing Commission voted 4-3 to promulgate the 1:1 ratio in the face of inconsistent mandatory minimums and provided Congress no information on a range of options.

#### *Sentencing policy applied fairly*

Part of the motivation for the Sentencing Commission's proposed crack amendments relates to a concern about racial bias arising from the current penalty structure. Federal prosecution efforts in all areas reflect an intent to direct federal resources toward the greatest criminal problems devastating our communities. Race is never a factor in our decision-making.

Maintaining a differential in the sentencing of crack and cocaine powder trafficking offenses reflects an attempt to ensure proper punishment of those who prey on the most vulnerable members of our society.

I would be pleased to answer any questions you may have.

The CHAIRMAN. Our next three witnesses will be three honorable members of the Sentencing Commission: the Honorable Richard P. Conaboy, who is chairman of the Commission; Mr. Michael Goldsmith, one of the Commissioners; and Mr. Wayne A. Budd, who also is a Commissioner. We will look forward to hearing from the three of you at this point.

Mr. Conaboy, we will start with you first.

**PANEL CONSISTING OF RICHARD P. CONABOY, CHAIRMAN, U.S. SENTENCING COMMISSION, WASHINGTON, DC; MICHAEL GOLDSMITH, COMMISSIONER, U.S. SENTENCING COMMISSION, WASHINGTON, DC; AND WAYNE A. BUDD, COMMISSIONER, U.S. SENTENCING COMMISSION, WASHINGTON, DC**

**STATEMENT OF RICHARD P. CONABOY**

Mr. CONABOY. Thank you, Mr. Chairman. I might, as a point of privilege, if I could, join in your comments to Ms. Harris. She has been a very big help to us over at the Sentencing Commission, and I join in your comments as to seeing her leave. We feel the same way, even though we disagree on some matters.

Mr. Chairman, I am here this morning, as you know, as chairman of the U.S. Sentencing Commission. A year ago, I was happily learning to retire as a senior judge and I ended up with this job, and it has been a very active 6 or 8 months principally because of this issue on the matter of the crack and cocaine penalties that presently exist in the Federal system.

This morning, with me are two other members of our Sentencing Commission, Wayne Budd, who is a lawyer in Boston and a member of our Commission, a former Associate Attorney General and U.S. attorney; and Michael Goldsmith, who is a professor of law and has had experience in both the prosecution and defense end of the criminal law business. They have been very valuable members of our Commission.

As you know, we voted on this issue and by a 4-to-3 vote made recommendations to the Congress. We have asked people on each side of the issue, so to say, to come here and talk to you about it because we know of your concerns, and you share indeed most of the concerns that we had in studying this matter.

In the 1994 crime bill, the Sentencing Commission was asked to study this cocaine problem, and particularly this matter where there is a distinction between the penalties for powder and crack cocaine. We indeed did that at your direction and your request. We spent many months, in fact almost 2 years, studying this matter and submitted to the Congress a 200-page report which I hope will be made a part of these hearings.

The CHAIRMAN. Without objection.

[EDITOR'S NOTE: The "Special Report to the Congress: Cocaine and Federal Sentencing Policy" of the U.S. Sentencing Commission was retained in committee files.]

Mr. CONABOY. In the conclusion of that report, it was our judgment, as well as the judgment of most people who testified before us, including the nonvoting members of the Commission, the Department of Justice, and the Parole Commission, that the 100-to-1 ratio in the law must be changed. However, there were some disagreements on some of the other issues that are involved.

We have a few charts here today and I will try not to make this oral testimony too long and just touch salient points of my remarks which I have already submitted in writing to the committee.

In the last 20 years, there have been dramatic increases in the penalties in all drug cases. It pains me a little bit to hear talk about this in the context of lowering penalties. Believe me, the pen-

alties in the sentencing guidelines have not been lowered. In most cases, they have been extended and made much more severe than they ever were. As the chart now being displayed will show, in the last 20 years penalties in drug cases have increased 4.5 times what they were in the 1970's. Of course, the Commission has been a part of that and agrees that severe penalties should be imposed in most of these drug cases.

Our concern when we were studying this matter is that in cocaine sentencing, there is a significant difference in the way crack and powder cases are sentenced. Trafficking in 5 grams of crack results in a 5-year sentence, whereas one would have to traffick 500 grams of powder cocaine to have the same penalty invoked. This is what is known as the 100-to-1 ratio.

The CHAIRMAN. Can I just ask you a question about that chart? Senator Feinstein raised this. What you are pointing here is the time given, not necessarily the time served?

Mr. CONABOY. In some instances, you are exactly right, I was going to mention that later. One of the dramatic things that has happened with the increase in sentences recently was the abolition of parole, so that there was a time when the sentence given was dramatically decreased by virtue of parole. But now with parole being eliminated, and the sentencing guidelines, plus some mandatory minimums, the sentences have become very, very severe, especially the time served, as compared to what it used to be.

Sometimes, I think it is forgotten that the abolition of parole kind of coincided with the introduction of the guidelines system, so that when we impose sentences on people now today in Federal courts, they are going to serve that time, with the exception of about 5 percent for good time. The concept of parole is gone and there are no more early releases from prison, so that time served has dramatically increased, and that is one of the reasons why the population in all our Federal prisons has also dramatically increased.

By the way, about 60 percent of the people in Federal prisons now are serving sentences for drug offenses, and about 40 percent of that group represents cocaine defendants, I am led to believe. But as we studied it, we determined that the 100-to-1 quantity ratio was just out of balance, as someone had mentioned here and, more importantly, had led to what we think are unintended results.

We have a diverse group on the Commission. We have people who were prosecutors, people who were professors. We have several judges on the district level and an appellate court judge, and so we had the ability to look at this from very diverse views. We bring to the Commission our experiences and our determination to try to make recommendations which we feel are justified on the facts. We, I am sure you know, do not consider ourselves as apologists for anybody who violates the law. Indeed, our job, unhappily, is determining sentences, and in most instances they are very, very severe indeed.

The basic reason for our decision follows along the lines that have been talked about here today. We were concerned, as everyone is, that there seems to be considerable violence and other untoward events in the drug business generally, and particularly in the

crack business. We found, however, that not all defendants fit into that category, and to paint them all with the same brush, especially one that is so severe as in this case, is not appropriate.

Second, we found that all cocaine, whether it is crack or otherwise, starts out as powder. For people to make crack cocaine, of course, they must have a source of powder, and what we find as a result of this disparate method of sentence is that many times the person who is supplying the powder, the higher level dealer, is getting a less severe sentence than the person on the street who is involved solely in the crack business.

Third, we found out that there is a tremendous racial impact and impact on the poor areas of this country. We are convinced that this was not an intended result when the legislation was passed, but the statistics on this level are startling and overwhelming. While more than 50 percent of the crack cocaine in this country is used by whites, the penalties in this fall staggeringly, in the 90-percent level, on blacks and other minorities.

We have also had the benefit just recently of a public opinion poll showing what the people in this country think of the sentences that are imposed in Federal courts. While in most instances the people on the street, so to say, seem to agree with the type of sentence that is imposed generally under the guidelines system, they were in agreement with us that the one area that is way out of control is in the area of the sentences for crack cocaine conduct.

Some people said to us during the course of our deliberations, why not just raise the powder offenses, why not make all offenses the same higher level. Well, our answers to that are several-fold. First, the penalties now under the guidelines—and I can't emphasize this too much—are severe. I had a letter just yesterday from a woman Federal judge in New York who made a suggestion to us that we should use television and other methods, perhaps, to make the public know how severe the penalties are under the guidelines. She said, "I don't think defendants or other people coming before us today realize how severe the present penalties under the guidelines are."

I think you have to think of things like the data displayed on this chart to really understand that our sentences are not easy by any means under the guidelines, and we have felt that those penalties are very severe, four times what they were in 1970. We have had little or no complaints from judges or the public or anyone else that our sentences are not severe, and we have what we think the Congress wanted to design with the guidelines, and that is a comprehensive scheme that sets levels for various types of drugs and various types of offenses, allowing us to have a scheme which sees that the more culpable person is punished more severely.

Raising powder cocaine penalties would, of course, increase the numbers that we have in prison very significantly. That is a very costly adventure that I don't think anyone feels, first, is a good result and, second, is the way we want to go in this country.

Those are the reasons, Mr. Chairman and members of the committee, that we looked at and that we used in arriving at our suggestion. We realize, let me say to you in all sincerity, that this is a very, very difficult decision to make, particularly in an era when everybody is worried about the matters that Senator Feinstein and

Senator Thompson mentioned, as well as the Chair, about what happens to our populace as a result of drug use and drug abuse. We are very concerned about that, but we just feel that the law itself must have an air about it of fairness, and we must hope, then, that it will be applied and administered in a way to show that sentences will also be fair and just.

The Commissioners who disagreed with us essentially felt, as somebody has already mentioned here, that perhaps the enhancements under the system would not be sufficient to address every single individual case. Perhaps there is some merit to that, but that again goes to the very heart of the sentencing guidelines system.

The system itself is designed to establish base offenses, and that is what we are talking about here. We are talking about establishing similar base offenses and then adding to those offenses enhanced penalties, depending upon a variety of elements, and we have even expanded those elements, which will automatically add to the penalties that are imposed.

This chart that we have up here now lists some of those, and I don't want to go over them and extend my time by mentioning them individually. Some of them have already been mentioned, but importantly and very interestingly, as some of the members here of this committee have said, in many instances, crack dealers will receive these enhancements, because this kind of conduct is there. As a result, they will be punished more, on average, than the cocaine dealers.

Even if this committee were to accept all of our recommendations flat out, we still project, as this next chart shows, that because of the fact that many of the crack dealers do have histories of criminal conduct and many times there is violence and other things involved, even with the use of the guidelines without the mandatory minimums, the sentences will still be more extensive and more severe for crack dealers than for powder dealers.

So what we are talking about is setting equal base sentences and then allowing the guideline system that you have designed—and I can tell you it is working well—to continue to work so that everybody will not be considered as the worst possible case and sentenced accordingly, but that each case will be sentenced according to its individual facts.

I know the Department says that every time we change these facts, it makes it more difficult, but again that goes to an issue of fairness. I can tell you, for instance, that in spite of the fact that people think the guidelines were going to create a tremendous amount of work for everybody, even in the drug areas 87 percent, I think it is, of the cases still end up in guilty pleas, so we are not overwhelmed with trials and long hearings on these things, as some might worry about, even though there is a question of requiring the prosecution to prove additional facts. But that cuts across and cuts right into the very basic tenet in our country that people are presumed innocent and that the burden of proof is on the Government to prove beyond a reasonable doubt the conduct that they did commit.

We, too, Mr. Chairman and members of the committee, looked at what we have always learned and have been told that this Con-

gress has repeatedly underscored, the Federal responsibility of disrupting major traffic operations. The concept of going after the lower-level drug dealer really flies in the face of that Federal policy that has been in force over the past four or five administrations. To try to make the sentencing policies such that the most culpable people will be punished most severely, I think, goes along with that concept, and the 100-to-1 ratio, in its nature, really flies in the face of that concept.

We have to say that part of the reasoning that we used was the fact that in its implementation this 100-to-1 statute, as I refer to it here has impacted most heavily on the poor and the black communities in this country. I know that we say that it is in those communities that most of the trouble happens, and it seems as though that is true, but that is true for almost all types of crime. It seems to impact more heavily in those areas, and to punish people in those areas more severely under the guise of trying to help them, we think, has some very fallacious underpinnings.

Mr. Chairman, in concluding, so that others can bring to your attention many of the other matters that we have considered—and I will be happy to try, as others have, to respond to any inquiries that you might have—let me say that I have been privileged to work for a long time. I have been a judge now over 33 years and I have been in this system for a long time, and I think and I am convinced it is the best system of justice in the world.

But we all know that to make that system work, two things must continue. First, we must pass laws that are in themselves fair and just. Second, we must administer those laws in ways that ensure fair and just results. In studying this law at your request, we determined unanimously, all members of the Commission, that no matter how well-intentioned the legislature was in passing the law, its implementation over the past several years has not been fair and it has had a startlingly disparate effect on one segment of the community, the poor and the black. Everyone involved in this process agreed on that.

There remained only one item of disagreement when we studied this whole thing, and that was whether the 100-to-1 quantity ratio should be abandoned altogether and let the guidelines work, or whether some small ratio should be retained to reflect concerns perhaps not addressable by the guidelines system.

We are respectfully requesting of you, and we know that you are trying to do that, to give a very close and thorough review of our recommendations and the reasons on which they were based, and we strongly suggest that an outright rejection of our recommendations would allow to continue a situation which everyone agrees was unintended and is unfair and which violates the basic tenets of our system of justice.

In accord with its mandate from you, the legislature, the Sentencing Commission must recommend stronger punishments whenever they are justified, but we also must recommend fairness where it is commanded, and this is an exquisite example of that latter situation. Where there is any injustice, we must be vigilant in our efforts to remedy it, but when the Government policy or Government law itself is unfair, or when a government policy or law is per-

ceived to be unfair or results in an unfair result, then our vigilance must be even greater.

We agree with all of you that crack is a horrible thing. All drugs are horrible, and we need to send a strong message about our unwavering intolerance to drug use, and especially drug trafficking. The Commission's guidelines, believe me, punish drug trafficking severely, but punishing crack more harshly because it is the drug choice of the poor, much like the cheap wine of those same neighborhoods, we believe, is wrong. We at the Commission are committed, as you are, to policies that we think are strong and smart and fair, and we hope to continue recommendations to you on this and other policies which are in that vein.

I appreciate this opportunity to come to the hearing. I hope that we can respond to any questions that you have in a way that will help us all reach an enlightened conclusion to this very vexing problem.

If I might, Mr. Chairman, and I hope I am not—I don't know what the lights represent, not being here very often. When I see a red light, it usually tells me stop.

The CHAIRMAN. That is what it is supposed to tell you. [Laughter.]

We have shown special deference to you, Judge.

Mr. CONABOY. Well, one of my 46 grandchildren is here with me today, Senator, and it is because of that that I extend my remarks.

The CHAIRMAN. OK.

Mr. CONABOY. By the way, that is one of the things that makes you worry and wonder about these problems. I am not only a judge for 33 years, but I have 12 children and I have 46 grandchildren, and when I look at them and think of what the future holds for them, the concerns about the drug problems are very real. Believe me, with that many children, you can be sure that we have seen in our family a little bit of all the ills of society, and you react accordingly. As Senator Feinstein says, when you see things up close, you begin to try to resolve them in the best way you can.

You asked a question before that has bedeviled me a bit, and that is whether or not there is some—I guess we could use the word "compromise," or some way to work some result out between the two extremes that seem to exist in this matter. I don't know the answer to that, and I say that from maybe even a procedural standpoint as a judge or a lawyer, I might say.

My Commission—I can tell you this in all honesty, and I think I speak for all of them—is willing to work with anybody to try our best to reach a resolution that is acceptable to everyone and we hope would be best under the situation. I don't know how that is done exactly here in Washington, or how we would do it as a commission vis-a-vis the Senate or the Congress, but we are willing to try anything.

We were constrained by our regulations which require us to make these recommendations within a certain time period, and then I understand that the Senate is constrained because you have 180 days to make your decision. If there is any way—and I have said this to the Department of Justice and I have said it to many others—that we can work to take another look at this or to look at it in view of any new input, I want to tell you as the chairman,



and I am sure I talk for everyone on the Commission when I say this, we would be most happy to do that.

The CHAIRMAN. Well, thank you, Judge. We appreciate having your testimony and appreciate all the hard work your Commission is doing.

[The prepared statement of Mr. Conaboy follows:]

#### PREPARED STATEMENT OF RICHARD P. CONABOY

Mr. Chairman, members of the Committee: it is an honor for me to be here today representing the United States Sentencing Commission. With me is Commissioner Wayne Budd, a former United States Attorney in the Bush administration and former Associate Attorney General in the Bush Justice Department. Also with me is Commissioner Michael Goldsmith, a Professor of Law at Brigham Young University. We very much appreciate the opportunity to address the Committee on the Commission's guideline amendments and legislative recommendations concerning cocaine and federal sentencing policy. There has been considerable misinformation about the Commission's recent actions, and we are pleased to have the chance to discuss our conclusions and recommendations with you. We hope to clear up any confusion and also to answer any questions you may have.

As you know, in the 1994 crime bill, Congress directed the Commission to study the issue of cocaine and federal sentencing policy and to provide recommendations for appropriate changes in the policy. I want to assure you that we have studied this issue very thoroughly. We have studied it from every conceivable angle and for many, many months. After all the research, after all of the long and sometimes difficult discussions, the Commission unanimously concluded that the current sentencing scheme for cocaine offenses could no longer be justified. This conclusion, and the facts that underlie it, are documented in the Commission's 200-plus page exhaustive report which we submitted to Congress in February.

To put cocaine sentencing policy into context, we should all understand that average sentences served by cocaine offenders have increased dramatically over the last 20 years. As the graph being displayed demonstrates, cocaine offenders now serve four and a half times as long in prison as offenders sentenced in 1970. The current sentencing guidelines provide for tough sentences for all drug offenses including cocaine offenses. The Commission strongly agrees that drug crimes should be prosecuted vigorously and that drug offenders should be punished severely.

However, in its extensive review of cocaine sentencing policy, the Commission was troubled by the current sentencing rules that provide disproportionately severe penalties for those convicted of trafficking in crack cocaine—penalties that are significantly higher than those for higher-level offenders trafficking in powder cocaine. If one sells five grams of crack, for example, the current law provides for a minimum five-year sentence. Someone selling powder cocaine would have to sell 500 grams to receive the same five-year penalty. It is this quantity difference—what most people refer to simply as the 100-to-1 quantity ratio—that the Commission found unjustified. It is true, as some will point out, that the "crack problem" is more severe in poor, predominately black neighborhoods, and that enhanced enforcement is often targeted to help those who live in such areas. But inflicting enhanced punishment on a specific segment of society under this guise is fallacious and misguided.

I will address the reasons for our conclusions in a moment, but I want to take just a minute to talk about the members of the Commission. Our members come from different parts of the country and from diverse backgrounds. We have on our Commission former prosecutors, defense attorneys, a law professor, trial judges, an appellate judge who is a former law school dean, and a former counsel to this Committee. It is an extraordinary group of hard working and thoughtful people. We have all worked very diligently on this issue, and I want to stress first the Commission's unanimity. We all agree on the conclusions contained in our report to Congress on cocaine sentencing policy as well as the facts that form the bases of the conclusions. And while we differ on parts of our final specific recommendations, our differences are relatively minor.

Mr. Chairman, the Commission's primary conclusion on the issue of federal cocaine sentencing policy is that the 100-to-1 ratio can no longer be justified and that base sentences for similar quantity crack and powder offenders should be equalized. Let me repeat myself on that last point: we concluded that base sentences—not the final sentences—should be equalized. These base sentences, which apply to all offenders, violent and non-violent, kingpin and courier, are enhanced by other provisions in the guidelines before arriving at a final sentence for an individual offender. What seems clear from our research and from recent congressional directives is that

proper public policy demands that violent offenders receive substantial prison terms. Therefore, under the revised sentencing system that we submitted on May 1, the base sentences are raised dramatically for the kingpin or for the offender who possesses a gun or uses children to commit a crime or is involved with gangs or drive-by shootings. This year, as part of the guideline amendment process, the Commission added several new enhancements that will raise penalties substantially for dangerous crack offenders. Together with existing guideline enhancements, base sentences will be raised for a long list of aggravating factors associated with crack and powder offenders—factors that are associated more often with crack offenders. Some of these aggravating factors are listed on the chart now being displayed. They include:

- possession, use, or discharge of a dangerous weapon
- possession of a restricted firearm, *e.g.*, machine gun
- murder of a victim in the course of a drug crime
- death or serious bodily injury resulting from the use of the drug
- drive-by shootings
- involvement of juveniles or street gangs
- sale of drugs to juveniles or pregnant women
- drug crime in a protected location
- significant prior criminal records
- continuing criminal enterprise
- and many others.

Under the amended sentencing policy, including base sentences and enhancements, sentences for crack cocaine offenders, on average, would remain significantly higher than sentences for powder offenders. Let me illustrate. The chart now being displayed shows how crack and powder offenders sentenced in 1994 would be sentenced under the revised system. Because certain specific harms are more commonly associated with crack cocaine than powder cocaine, at all quantity levels, crack offenders on average would still receive significantly greater sentences than powder offenders. When a firearm is present in a cocaine offense, when a defendant uses a juvenile in a cocaine crime, when a gang is involved, the guidelines provide for stiff sentences regardless of whether it is crack or powder cocaine, or for that matter, any other drug.

The Commissioners who disagreed with the decision on equalizing base sentences were concerned that the enhancements might not capture all of the harms associated with crack as noted in our report. However, to reiterate that the differences on the Commission were small, you should be aware that the Commissioners who dissented from our recommendation did not seriously discuss any ratio greater than 5-to-1, and Commissioner Goldsmith specifically raised the possibility of a 5-to-1 ratio, at least for some crack cocaine traffickers.

The Commission majority arrived at the policy of equally severe base sentences, joined with significant penalty enhancements for aggravating conduct, because of certain undeniable facts. First, of greatest concern to the Commission was the random, predatory violence, as well as the use of children in drug trafficking, that seems to accompany the introduction of crack cocaine trafficking in a community. However, despite these dangers, not all persons convicted of trafficking crack cocaine deserve equally severe punishment. The Congress created the Commission and the sentencing guidelines for the explicit reason of providing different sentences for offenders of different culpabilities. A woman who allows her home to be used by a crack dealer to store a small amount of drugs is not as culpable and should not be imprisoned as long as the gang leader who stalks and terrorizes a neighborhood or who gets kids involved in drugs. Congress embraced proportional sentencing when it wrote the Sentencing Reform Act and the Commission strongly believes in it. Because the 100-to-1 quantity ratio predates the sentencing guidelines, it was not designed to target the most severe sentences and our valuable and scarce prison resources toward violent offenders and thus understandably does not allow for appropriate proportionality in sentencing. Now that the guidelines are in place, prison resources and the most severe sentences can be better targeted at violent offenders. To do so, we believe, is good, smart public policy.

Second, virtually all cocaine imported into the United States arrives as powder cocaine. Only in the final stages of distribution, at the local level, is some of that powder transformed into crack. This is vitally important because any sentencing system that provides higher base penalties for crack cocaine will lead to the unfair

and unwise result that more sophisticated, higher-level powder suppliers will be sentenced relatively less severely than some of the retailers they supply. For example, under the current 100-to-1 quantity ratio, a drug dealer who sells 100 grams of powder cocaine in 10 gram amounts to a series of small time crack dealers would likely be sentenced to significantly less time in prison than any one of those street dealers. This is true despite the fact that a simple process transforms powder into crack and despite the fact that the supplier introduced the powder that made the crack possible. In setting national drug policy, Congress has repeatedly underscored the unique federal responsibility of disrupting major trafficking operations. The need for federal enforcement to focus on major operations was reiterated recently in congressional testimony by William Bennett, the former Bush Administration drug policy director. The current drug czar, Dr. Lee Brown, in a letter to the Commission also stated that the federal enforcement priority today remains on large scale drug operations. Use of the 100-to-1 quantity ratio turns this long-held federal drug enforcement focus on its head.

Third, while the Commission found no racially motivated intent in the creation of the 100-to-1 quantity ratio, there can be no doubt that the higher penalties for crack offenders fall disproportionately on minority defendants. Crack is cheap and thus distributed and attractive to the poor, many of whom are minorities. With the 100-to-1 ratio, we have unintentionally developed the anomaly of punishing the poor and minorities more severely under the guise of trying to protect them.

The current sentencing policy of disproportionately harsher penalties for crack offenses also runs counter to public opinion. The Commission recently conducted a national survey to determine how the American public's view of appropriate sentencing policy compares with currently operative sentencing policy. The Commission surveyed more than 1,700 individuals and found that generally, the American public agrees with the tough sentences mandated by the guidelines and current sentencing law. In only a few areas was there strong disagreement, but significantly the strongest area of disagreement occurred over crack cocaine sentencing. While current law provides for harsher penalties based solely on the type of drug involved, the American public did not significantly differentiate offenders based on drug type and did not agree with the extremely severe penalties for all crack offenders. Of greatest concern to the public, and of greatest concern to the Commission, is the violence often associated with drug trafficking. Our amended sentencing system addresses this concern head on.

There has been some suggestion that rather than making the adjustment recommended, the Commission should simply raise the powder cocaine penalties to the crack cocaine levels. While at first blush this may sound appealing, there are several serious problems with such a proposal. First, cocaine sentences are now quite harsh, and at the current levels, we are incarcerating increasing numbers of defendants for increasingly longer periods of time. We have received no serious complaints from Congress, law enforcement, or others that these penalties are too soft. Second, with the exception of crack cocaine, sentencing levels for different drugs were created under a comprehensive plan to attack mid-level and upper-level dealers. The legislative history of the 1986 Anti-Drug Abuse Act makes that clear. With crack, however, the most typical federal defendant is a street-level dealer. These defendants are receiving sentences comparable to mid-level and the most serious powder dealers. Raising penalties for powder cocaine could distort this sensible structure and result in application of the mandatory minimums to defendants at lower culpability levels.

Finally, the system is currently designed so that heroin dealers are sentenced harsher than cocaine dealers who in turn are sentenced harsher than marijuana dealers. That is, more serious drugs are sentenced harsher than less serious drugs. Currently, heroin is punished at a 5-to-1 quantity ratio to powder cocaine while, crack is punished at a much more severe 100-to-1 ratio to powder. If Congress were to raise powder penalties to the crack levels, cocaine offenses would be sentenced more severely than those involving heroin, PCP, or methamphetamine, all of which are considered to be equally serious or more serious drugs. Also, raising powder penalties to the crack levels would greatly increase the federal prison population and would require substantial new prison resources at a time when drugs are the largest part of the federal criminal docket and cocaine offenses are by far the most frequently prosecuted type of drug case.

There are a number of other reasons for our conclusions and recommendations regarding cocaine sentencing policy which are spelled out in depth in our report to Congress. Mr. Chairman, I would respectfully request that the report be made a part of the permanent record of this hearing.

Mr. Chairman I have been privileged to work for a long time in what I think is the best system of justice in the world. We all know that to make that system work,

two things must continue. One, we must pass laws that are fair and just, and two, we must administer those laws in ways that ensure fair and just results.

In studying this law—as you requested—we determined unanimously that, no matter how well intentioned the legislature was in passing the law, its implementation over the past several years has not been fair and it has had a startlingly disparate effect on one segment (the poor and the black) of our country. Everyone involved in the process recognizes this.

There remained only one item of disagreement; whether the 100-to-1 quantity ratio should be abandoned completely allowing the guidelines to be used to adjust penalties, or whether some small ratio should be retained to reflect concerns perhaps not addressable by the guideline system. We respectfully request a very close and thorough review of our recommendations and the reasons on which those recommendations are based, and we strongly suggest that an outright rejection of those recommendations would allow to continue a situation which everyone agrees was unintended and is unfair and which violates the basic tenets of our system of justice.

In accord with its mandate from the legislature, the Sentencing Commission must recommend stronger punishments where it is justified, but we must also recommend fairness where it is commanded, and this is an exquisite example of the latter.

Mr. Chairman, when there is any injustice, we must be vigilant in our efforts to remedy it. But when government policy is unfair, or even when government policy is perceived to be unfair, our vigilance must be even greater. Long ago, Mr. Justice Brandeis compared our government to a teacher. "For good or for ill," he said, the government "teaches the whole people by its example." If the government is seen as unfair or unjust, it breeds contempt for the law. Our recent history bears this out.

Crack is a horrible thing. All drugs are horrible. We need to send a strong message about our unwavering intolerance to drug use and drug trafficking. The Commission's guidelines punish all drug trafficking severely. But punishing crack more harshly because it is the drug of choice of the poor—like the cheap wine of those same neighborhoods—we believe is wrong. We at the Commission are committed to policies we think are strong, smart, and fair. We believe our recommendations on cocaine sentencing policy are in that vein.

I thank you again for giving us the opportunity to be here. After Commissioners Goldsmith and Budd make their remarks, I would be happy to respond to any questions that the committee might have.

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Chart I

# Average Sentences Imposed For Cocaine Trafficking 1971 - 1994

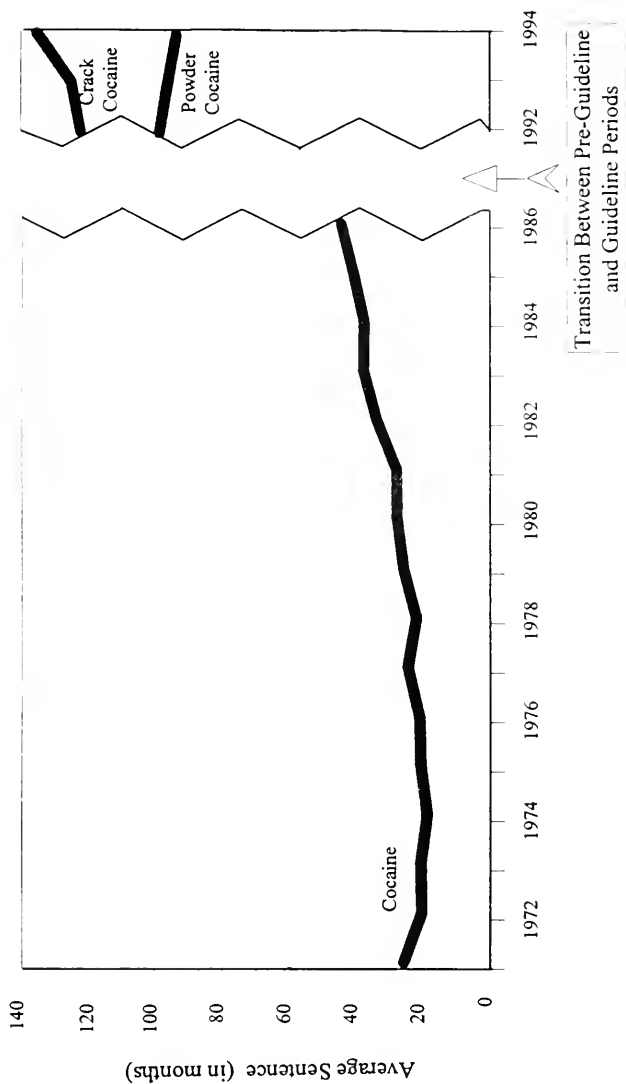
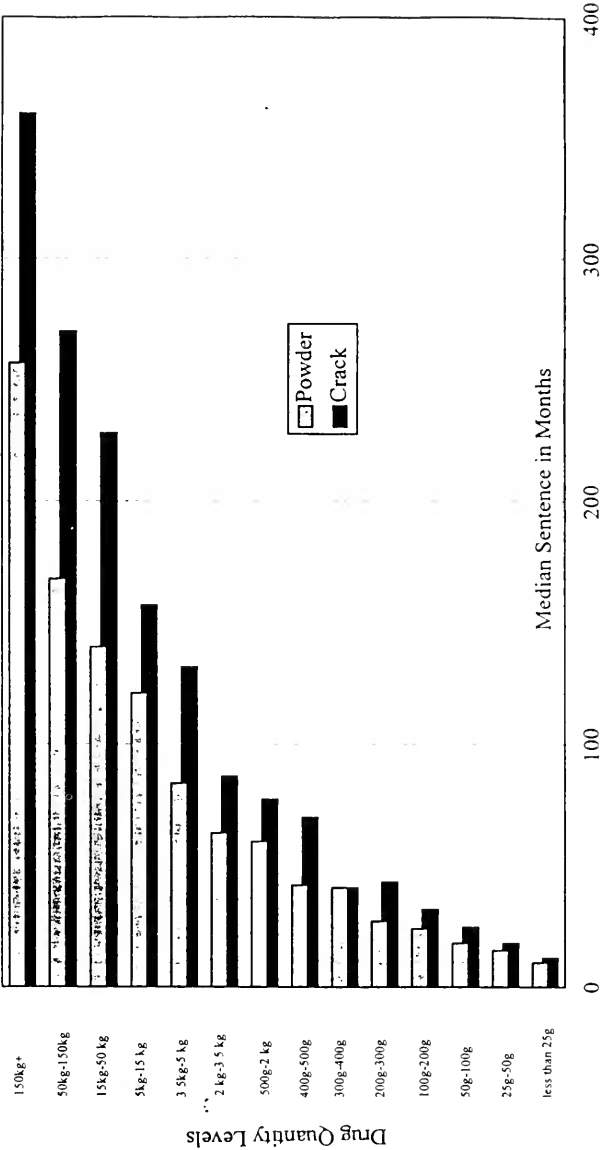


Chart II

# Estimated Median Powder and Crack Cocaine Sentences Under Amended Statutes and Guidelines



Sentences for defendants were estimated using the Commission's Prison Impact Model. Departure cases have been excluded from the analysis.  
Source: U.S. Sentencing Commission, 1994 Datafile, MONFY94.

## **Aggravating Factors that Lengthen Drug Sentences Under the Guidelines**

- Possession, use, or discharge of a dangerous weapon
- Possession of a restricted firearm, e.g. machine gun
- Murder of a victim in the course of a drug crime
- Death or serious bodily injury resulting from the use of the drug
- Drive-by shootings
- Involvement of juveniles or street gangs
- Sale of drugs to juveniles or pregnant women
- Drug crime in a protected location
- Significant prior criminal records
- Continuing criminal enterprise

The CHAIRMAN. Mr. Goldsmith, we will turn to you next. Now, we do give 5 minutes, normally.

Mr. GOLDSMITH. I only have 2 children, Senator. I feel privileged just to be here today. [Laughter.]

The CHAIRMAN. Three minutes. [Laughter.]  
Go ahead.

#### STATEMENT OF MICHAEL GOLDSMITH

Mr. GOLDSMITH. Mr. Chairman and members of the committee, thank you for giving me the chance to present my views on the Sentencing Commission's recently proposed guideline amendments and statutory recommendations, as well, concerning Federal cocaine policy.

I would like to stress at the outset not just my high regard for Chairman Conaboy and my colleagues on the Commission, but the fact that on this issue the Commission overall stands very much united. The Commission, at the outset, issued a report as to which we unanimously agreed that the present 100-to-1 quantity ratio between crack and powder cocaine was unwarranted and not to be recommended.

The principal difference between the Commissioners at this point—and I, as you know, voted among the dissenters with respect to the present proposal—the principal difference between us concerns what ratio, if any, ought to replace the clearly discredited 100-to-1 quantity ratio.

In our report, the Commission suggested that a more appropriate penalty scheme could be achieved through the guideline system, and that we had hoped that by establishing appropriately weighted guideline enhancements—in other words, specific offense characteristics, general adjustments, offender characteristics, et cetera—we could create a penalty scheme that would be fair and appropriate.

Accordingly, the Commission set out to identify pertinent characteristics typically associated with crack cocaine, and we adopted by a 6-to-1 vote several appropriate enhancements reflecting such harms—enhancements, for example, covering possession of a firearm, adjustment for use of a minor in the offense, and certain bodily injury departure language.

My disagreement with the Commission majority, however, reflects my concern that these enhancements do not adequately capture the differences, and principally the systemic differences, between crack and powder cocaine to warrant a return to what I view as another extreme position, which is the adoption of a 1-to-1 ratio.

Together with Commissioners Carnes and Tacha, I dissented from the majority position because I believe that the Commission's new proposal, including its new proposed enhancements, do not account for all of the systemic harms uniquely associated with crack cocaine. For example, we have found that for a variety of reasons, crack cocaine is potentially more addictive than powder cocaine. That addictiveness, however, is not a factor that lends itself to being incorporated into the guidelines as a separate enhancement factor.

Likewise, crack cocaine poses special risks to minors and to pregnant women. Risks to such persons exist, I submit, even if the person to whom the crack is sold is neither young nor pregnant, since



in most circumstances typical of the crack market eventual usage by a minor or by a pregnant woman is reasonably foreseeable.

Because I believe that these systemic dangers cannot be captured by guideline enhancement standing alone, I think that another way must be found to account for these factors in determining punishment. In light of that, I have opposed the present recommendation for a 1-to-1 quantity ratio between crack and powder cocaine.

In my view, some differential between crack and powder cocaine is warranted at least at some quantity levels. For example, when it comes to a low-level street dealer, a 1-to-1 quantity ratio might, in fact, be suitable when combined with the Commission's newly proposed and quite severe enhancements. However, in my judgment, a 1-to-1 quantity ratio even with these enhancements simply fails to achieve appropriate incarceration for the more serious mid-level crack dealers.

For example, because crack is typically used in dosages ranging from one-tenth to one-half of a gram, 50 grams of crack potentially produces between 100 and 500 dosages. Under the proposed change, a mid-level dealer who pleads guilty to distributing 50 grams of crack, an amount that would presently trigger a 10-year sentence, would face a guideline sentence of 12 to 18 months' imprisonment, a term which, in my judgment, is far too short for a dealer responsible for generating up to 500 dosages of crack.

In my judgment, the failure of the 1-to-1 ratio to provide sufficiently high sentences at the high quantity levels occurs because the 1-to-1 ratio disregards important organizational and market factors that distinguish crack and powder cocaine. The presence of these factors often means that comparable quantities of powder and crack do not necessarily correlate with culpability.

For example, information given to the Commission suggests that in light of the way that crack is marketed, a person convicted of selling 100 grams may often be characterized as a mid-level dealer. By comparison, 100 grams of powder is rarely suggestive of a mid-level powder dealer. Rather, 100 grams of powder usually typifies a low-level powder retailer. 500 grams of powder is more indicative of a mid-level dealer.

Thus, for punishment purposes, a defendant convicted of selling 500 grams of powder—in other words, a mid-level powder dealer—is roughly comparable to a person guilty of selling 100 grams of crack. That analysis suggests that a 5-to-1 quantity ratio between the two might more accurately reflect the realities of the two distinct drug trades. Another basis for possibly adopting a 5-to-1 ratio for crack to powder cocaine is by comparison to heroin and methamphetamine offenses, which are presently sentenced at a level of 5-to-1 relative to powder cocaine.

A further possibility for this body to consider is a 10-to-1 quantity ratio, as to which some precedent exists under the guidelines already, for applying a 10-to-1 quantity-based ratio to the smokable form of a drug. We have seen that crack is more dangerous than powder cocaine largely because it is smoked. Likewise, pure methamphetamine and ice are concentrations of methamphetamine that are more efficiently smoked than standard methamphetamine. Under the sentencing guidelines, pure meth and ice offenses are sentenced at a level of 10-to-1 relative to standard meth offenses.

Mr. Chairman, I note the red light has gone on. I am not a judge. May I have just a moment or two to conclude my remarks?

The CHAIRMAN. Sure, go ahead.

Mr. GOLDSMITH. Thank you.

So I think there is some basis for at least considering a 10-to-1 quantity-based ratio. Another factor to consider here is that 50 grams of powder typically generates 50 sales of powder cocaine. Fifty grams of powder translates oftentimes into a sale based upon a 1-gram unit. By comparison, 50 grams of crack oftentimes will generate 500 sales of crack cocaine, and so there again we have some basis for viewing this in terms of 10-to-1.

I also think that there is something to be said for discouraging people from converting powder into crack cocaine. Presently, under the guidelines in several areas we provide enhanced penalties for defendants who have converted an illicit drug into a more dangerous form of the same drug. For example, the meth trafficker who converts his product into smokable ice is subject to a higher penalty, and so therefore we create a disincentive within the system to make the conversion from meth into ice. Likewise, in this context from powder into crack, I believe we should create a similar disincentive.

Finally, applying a 10-to-1 ratio would certainly punish crack distributors adequately. For example, under a 10-to-1 ratio, a mid-level crack dealer who pleads guilty to distributing 100 grams of crack would face a guidelines sentence of 51 to 63 months imprisonment, a sentence that strikes me as considerably more appropriate than the 18- to 24-month sentence often resulting under a 1-to-1 quantity ratio.

Let me also say that, in my judgment, this issue has been unduly framed, at least to a degree, in terms of racial considerations. We have seen that there is no persuasive evidence that present Federal sentencing policy is based upon discriminatory considerations, nor does the record suggest or demonstrate that African-American crack dealers are treated more severely than their Caucasian crack counterparts.

Our special report found that the 100-to-1 quantity ratio affected a disproportionate number of African-American defendants, and that undoubtedly is true, but this result reflects the reality of the crack trade which has been dominated by African-American retailers who, in turn, have devastated many inner-city economically disadvantaged African-American communities throughout the country.

Furthermore, Federal law is not applied constitutionally in a discriminatory sense so long as it is applied equally to all persons who violate it. By analogy, the Federal RICO law was first established to target organized crime groups dominated by persons of Sicilian descent. This application, however, reflected the reality of organized crime in America at that time rather than any improper discriminatory purpose. Moreover, RICO has since been applied across the board to other violators across ethnic and racial lines. This same principle applies to Federal narcotics laws which apply evenhandedly to all violators.

I want to bring to your attention, however, the fact that recently the argument has been brought to my attention that the existing laws are applied in a discriminatory manner because black crack

dealers are routinely prosecuted in Federal courts where the penalties are higher, while white crack dealers more often are processed through the relatively lenient systems of the States.

If that is true that, in fact, the State courts are dealing with white crack dealers in a more lenient manner than the Federal courts, and if there is some type of a routing process to that effect, that indeed would be a matter of serious concern which would merit your immediate attention and response.

Presently, I dissent from the Commission's recommendations to return to 1-to-1 because I view that as too extreme a position. At the same time, I wish to urge this Congress to terminate the present 100-to-1 ratio. To my knowledge, no one who has studied this problem, including the Department of Justice, supports such a disproportionately high and unfair ratio.

We all recognize that there is tremendous pressure out there, in a sense, to raise penalties. However, Congress has established the Sentencing Commission as a nonpartisan institution designed to operate objectively and without regard to outside pressures. The present Commission, which includes members such as Wayne Budd and myself who have devoted substantial portions of our careers to law enforcement, has studied this problem carefully and unanimously rejected the 100-to-1 ratio. This rejection is supported by sound policy and common sense.

For example, the present 100-to-1 ratio creates bizarre results and incentives within the criminal justice system. Under the 100-to-1 ratio, a street dealer now faces as much as 78 to 97 months imprisonment. That, perversely, is a far greater penalty than the law often imposes upon the powder distributor who sold them the powder for conversion into crack. In effect, this 100-to-1 ratio thereby encourages street dealers to avoid greater penalties by becoming high-level powder distributors. That, indeed, is bizarre.

The 100-to-1 ratio is also inconsistent with traditional theories of punishment, and as a law professor I feel it incumbent upon myself, I guess, to get into that to a degree with you. I teach my students black-letter legal principles on occasion, and so I feel bound to follow them myself.

The present penalty structure for low-level crack dealers is patently excessive. It overrides the principal of just desserts. For this reason, the penalty is viewed as one that lacks legitimacy. The perpetrators, the defendants, always view it as unfair, and consequently when they spend their time in prison, rather than focusing on being rehabilitated, they tend to wallow in anger and bitterness over the obvious unfairness of their sentence.

Inevitably, such bitterness produces undesirable consequences. Such inmates are more likely to engage in violence or other socially inappropriate behavior. Of greater concern, at some point these folks are going to be released, and upon their release, rather than having been rehabilitated through imprisonment, they are going to explode with rage.

Excessive incarceration of low-level crack dealers at this time will inevitably foster excessively criminal behavior tomorrow. For this reason, a vote in favor of 100-to-1 is not one that I view as tough on crime. Rather, it offers the illusion of a short-sighted solution to a long-term problem.

Further, this illusion will come at a price. Federal prisons already are experiencing space problems. Such pressures will increase as the 100-to-1 ratio inevitably produces longer prison terms. In response, the Federal Government will need to spend valuable dollars building new prisons.

My own view is that rather than respond to outside pressures, Congress ought to craft a principled solution to this problem. A quantity ratio in the range of 5- or 10-to-1 provides a better framework for application of the guidelines. Either of these ratios for crack offenses, when combined with the Commission's recently proposed enhancements to the guidelines, will produce an appropriately severe sentence consistent with all the goals of the criminal justice system.

I thank you for your time.

The CHAIRMAN. Thank you, Mr. Goldsmith. We appreciate your testimony.

[The prepared statement of Mr. Goldsmith follows:]

#### PREPARED STATEMENT OF MICHAEL GOLDSMITH

Mr. Chairman, members of the Committee: thank you for the opportunity to present my views on the Sentencing Commission's recent guideline amendment and statutory recommendation concerning federal cocaine sentencing policy. First, I wish to express my high regard for the work of the entire Commission on this very difficult issue. I agree with Chairman Conaboy that, despite the Commission's divided vote on the one-to-one quantity ratio between powder and crack cocaine, our differences are small. As I stated in my written dissent to the guideline amendment submitted by the Commission to Congress, I support the Commission's *Special Report* on cocaine sentencing policy in which we *unanimously* rejected the 100-to-1 quantity ratio.<sup>1</sup> Further, I continue to support the Commission's unanimous recommendation to treat simple possession of crack cocaine commensurately with simple possession of powder cocaine. Thus, my dissenting opinion and our 4-3 vote on the one-to-one quantity ratio arises within a broader context of consensus concerning central aspects of federal sentencing policy for cocaine offenses.

The Commission's *Special Report* unanimously concluded that "[r]esearch and public policy may support somewhat higher penalties for crack versus powder cocaine, but a 100-to-1 quantity ratio cannot be recommended."<sup>2</sup> Our Commission stands divided only over which quantity ratio ought to replace the discredited 100-to-1 standard.

In our *Special Report*, the Commission suggested that a more appropriate penalty scheme could be achieved through the guideline system. We hoped that by "develop[ing] appropriately weighted guideline enhancements (i.e., specific offense characteristics, general adjustments, offender characteristics) corresponding to important offense and offender characteristics present in crack cases,"<sup>3</sup> we could create a sentencing scheme that reflects the enhanced dangers associated with crack cocaine.

Accordingly, the Commission set out to identify the pertinent characteristics typically associated with crack cocaine, and adopted, by a 6-1 vote,<sup>4</sup> several appropriate enhancements reflecting such harms (i.e., specific offense characteristics for possession and use of a firearm, a Chapter 3 adjustment for use of a minor in the offense, and bodily injury departure language). My disagreement with the Commission majority is with whether these enhancements adequately capture the differences between crack and powder cocaine to warrant a one-to-one ratio as a starting point for sentencing under the guidelines.

<sup>1</sup> See U.S. Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* xiv & 198 (Feb. 1995) [hereinafter *Special Report*].

<sup>2</sup> *Id.* at xiv.

<sup>3</sup> *Id.* at xv.

<sup>4</sup> In dissenting, Commissioner Mazzone stated that the enhancements "make sense," but he declined to vote in favor of them before the Commission's resolution of the crack-powder cocaine ratio issue. Presumably, in light of Commissioner Mazzone's vote with the Commission majority on the one-to-one ratio, he would now vote in favor of these enhancements.

Together with Commissioners Tacha and Carnes, I dissented from the majority position because I believe the Commission's new enhancements do not account for all of the systemic harms uniquely associated with crack cocaine. For example, the evidence shows that crack is administered in a manner that is potentially much more addictive than powder cocaine.<sup>5</sup> This aggravating danger cannot be integrated into the guidelines simply as a separate enhancement factor. Similarly, crack cocaine poses special risks to minors<sup>6</sup> and to pregnant women.<sup>7</sup> Risks to such persons exist even if the person to whom the crack is sold is neither young nor pregnant. Under most circumstances typical of the crack market, eventual usage by minors or pregnant women is reasonably foreseeable even if the immediate case (or the defendant's relevant conduct) does not involve such participants.

I believe that, since such systemic risks cannot be captured by guideline enhancements standing alone, another way must be found to account for these factors in determining punishment. The Commission's *Special Report* contemplated this possibility. In pertinent part, we stated:

[I]f the Commission ultimately concludes that some quantity ratio between powder and crack cocaine is necessary, that differential can be reflected by establishing appropriately different guideline base offense levels for offenses involving the two drugs.<sup>8</sup>

Before discussing specific alternatives to the one-to-one quantity ratio, I wish to emphasize that our guideline system does a far better job of achieving appropriately severe punishment—as well as proportionality in sentencing—than the system of mandatory minimums which are based simply on drug type and quantity. Indeed, the Commission's 1991 report on mandatory minimums unanimously made this point within the broader context of our criminal justice system.<sup>9</sup> I do believe, however, that quantity helps determine culpability in many drug cases.<sup>10</sup> Higher quantity levels often tell us something important about the scope of the criminal activity: that a broader drug trafficking network is involved.

In my view, a guideline base offense differential between crack and powder cocaine may be warranted for at least some quantity levels. For example, for low level street dealers, a one-to-one quantity ratio might be suitable when combined with the Commission's newly proposed enhancements.<sup>11</sup> However, a one-to-one quantity ratio—even with enhancements—simply fails to achieve appropriate incarceration for the more serious, mid-level crack dealers. For example, because crack is typically used in dosages ranging from .1 to .5 grams, 50 grams of crack potentially produces between 100 and 500 dosages. Under the proposed changes, a mid-level dealer who pleads guilty to distributing fifty grams of crack (an amount that would currently trigger a ten-year sentence) to street-level dealers, would face a guideline sentence of twelve to eighteen months imprisonment. Such a term is too short for a dealer responsible for generating up to 500 dosages of crack.

The failure of the one-to-one ratio to provide sufficiently high sentences at the higher quantity levels occurs because the one-to-one ratio disregards important organizational and market factors that distinguish crack and powder cocaine. The presence of these factors often means that comparable quantities of powder and crack do not necessarily correlate with culpability. However, selecting a ratio that adequately and fairly provides for appropriate punishment for crack distribution offenses, like all sentencing policy, is certainly not an exact science. Rather, the process involves considering a number of options, weighing their relative advantages and disadvantages, evaluating their impact on potential sentences, and ultimately making a judgment call on which option proves most acceptable.

In making this determination, it is helpful to view the actual sentence differentials between crack and powder cocaine defendants at various ratios. Thus, I have included some tables to highlight these areas. See Tables A1-A3 (showing, for example, that at a ten-to-one ratio, crack sentences would be approximately 150 percent

<sup>5</sup> *Special Report*, at 24-28.

<sup>6</sup> *Id.* at 195.

<sup>7</sup> *Id.* at 189-90. More specifically, the immediate risk is to the fetus.

<sup>8</sup> *Id.* at 200.

<sup>9</sup> See U.S. Sentencing Commission, *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 33-34 (1991).

<sup>10</sup> Quantity alone, however, ought not be determinative. Oftentimes, it may be outweighed by other important factors such as the defendant's role in the offense.

<sup>11</sup> To the degree that the resulting framework decreases federal penalties for street level sales, state criminal justice systems may compensate by choosing to impose more severe penalties under state law. No reason exists to inundate our federal courts and penitentiaries with low-level crack violators.

to 300 percent greater than powder sentences). With this in mind, I offer the following brief discussion of two alternatives: five-to-one and ten-to-one.

Information presented to the Commission suggests that, given the way that crack is marketed, a person convicted of selling 100 grams may often be characterized as a mid-level dealer (i.e., someone who provides the drug to street-level retailers).<sup>12</sup> (See Table B). By comparison, 100 grams of powder is rarely suggestive of a mid-level powder dealer. Rather, 100 grams of powder usually typifies a low-level retailer; 500 grams of powder is more indicative of a mid-level dealer (i.e., someone who supplies the street sales retailer).<sup>13</sup> Thus, for punishment purposes, a defendant convicted of selling 500 grams of powder (i.e., a mid-level dealer) is roughly comparable to a person guilty of selling 100 grams of crack (i.e., also a mid-level dealer.) This analysis suggests that a five-to-one quantity ratio between powder and crack might more accurately reflect the realities of the two distinct drug trades.<sup>14</sup>

Some have also advocated a five-to-one ratio for crack to powder cocaine, in large part because heroin and methamphetamine offenses are sentenced at a level of five-to-one relative to powder cocaine. Presumably, heroin and methamphetamine offenses are sentenced more severely than powder cocaine because, like crack, they are more potent. Additionally, unlike powder cocaine or crack, heroin is physically as well as psychologically addictive. While the fact that crack poses no risk of physical addiction may weigh in favor of treating crack offenses less harshly than heroin, other factors cut the other way. For example, heroin must be injected to obtain maximum effect, and most users obviously prefer to avoid this route of administration. Heroin also is generally more expensive than crack, and so it is not as accessible to children. Perhaps for these reasons, our most current data indicates that heroin usage is not as prevalent as crack in this country. Further, sentences for crack offenders may be too low if sentenced at a quantity ratio of five-to-one. See Table C (setting forth the starting points for sentences at various quantity levels).

As for a ten-to-one quantity ratio, some precedent exists under the guidelines for applying this ratio to the smoke-able form of a drug. Like crack, which is more dangerous than powder cocaine largely because it is smoked, pure methamphetamine and "Ice" are concentrations of methamphetamine that are more efficiently smoked than standard methamphetamine (which is usually snorted). Under the sentencing guidelines, pure methamphetamine and "Ice" offenses are sentenced at a level of ten-to-one relative to standard methamphetamine offenses.<sup>15</sup>

Moreover, as discussed above, another consideration that makes crack more dangerous to society than powder cocaine is the fact that crack is usually broken down and sold in single-dose units, thereby providing access to a wider range of individuals—particularly children and the economically-disadvantaged. Powder cocaine, on the other hand, is generally sold per gram. Fifty grams of powder cocaine, therefore, ordinarily represents fifty potential sales. Fifty grams of crack, by comparison, can be divided into as many as five hundred doses and thus can represent five hundred sales—ten times as many sales as an equivalent amount of powder. Thus, a ten-to-one quantity ratio makes sense insofar as it sentences crack and powder cocaine distributors according to the number of sales that they have generated.

An enhanced risk also occurs when a drug dealer converts powder into crack cocaine. For this reason, the guidelines in several areas provide enhanced penalties for those defendants who have converted an illicit drug into a more dangerous form of the same drug. For example, the methamphetamine trafficker who converts his product into smoke-able "ice" is subject to a higher penalty, as is someone who converts the precursor chemical into methamphetamine.<sup>16</sup>

Finally, applying a ten-to-one ratio would certainly punish crack distributors adequately. For example, under a ten-to-one quantity ratio, a mid-level crack dealer who pleads guilty to distributing 100 grams of crack would face a guideline sentence

<sup>12</sup> See U.S. Sentencing Commission, *Implementation of Crack Report Recommendations 2* (Amendment Packet, March 24, 1995).

<sup>13</sup> See *Special Report*, *supra* note 1, at 118–21 (emphasizing that Congress selected five-year mandatory minimum quantities, which include 500 grams for powder distributors, as representative of quantities associated with serious or mid-level traffickers).

<sup>14</sup> If anything, Commission data suggest that mid-level powder cocaine distributors generally deal in quantities ranging between 2,000 and 3,500 grams. See *Implementation of Crack Report Recommendation*, *supra*, note 10, at 2; U.S. Sentencing Commission, *Comparison of Drug Quantity Levels for Mid-Level Crack and Cocaine Dealers* (Working Document in Response to Commissioner's Request) (March 1995) (See Table B). Moreover, the Drug Enforcement Administration assigns the same priority level to crack dealers distributing 50 grams and powder dealers distributing 1,000 grams. Therefore, a ratio of higher than five-to-one may appropriately reflect the market differences between crack and powder cocaine.

<sup>15</sup> United States Sentencing Commission, *Guidelines Manual* §2D1.1.

<sup>16</sup> *Id.*

of 51 to 63 months imprisonment, a sentence that strikes me as considerably more appropriate than the 18 to 24 month sentence often resulting under a one-to-one quantity ratio. See Table C.<sup>17</sup>

Before concluding, I wish to address the role of race in this debate. In my original dissent, I wrote that the issue of the appropriate cocaine sentencing policy has been unduly framed in racial terms by some constituency groups. No persuasive evidence exists that federal sentencing policy in this area is based on discriminatory considerations. Nor does the record demonstrate that African-American crack dealers are treated more severely than Caucasian crack dealers.<sup>18</sup> Our *Special Report* found that the 100:1 quantity ratio affected a disproportionate number of African-American defendants.<sup>19</sup> This is indisputably true, but this result reflects the reality of the crack trade, which has been dominated by African-American retailers who, in turn, have devastated many inner-city, economically disadvantaged African-American communities throughout the country.

Furthermore, a federal law is not unconstitutionally discriminatory so long as it is applied equally to all persons who violate it. By analogy, the federal RICO statute was first applied to established organized crime groups dominated by persons of Sicilian descent. This application, however, reflected the reality of organized crime in America at that time rather than any improper discriminatory purpose. Moreover, RICO has since been applied to other violators across ethnic and racial lines. This same principle governs federal narcotics laws, which apply even-handedly to all violators.

I continue to abide by these views as expressed in my dissent. Recently, however, the argument has been expressed to me that the existing quantity ratio is discriminatory in effect because black crack dealers are routinely prosecuted in federal courts—where the penalties are higher—while white crack dealers more often are processed through the relatively lenient state systems. If true, this allegation merits your immediate attention and response.

Presently, I continue to dissent from the majority's vote to reduce the quantity ratio between powder and crack cocaine to one-to-one. I believe the Commission properly rejected the 100-to-1 ratio as too extreme. By suggesting that a one-to-one ratio is appropriate, however, the Commission proposes returning to the other extreme. I suggest a more appropriate course based on the policy and market differences between crack and powder cocaine rather than on a formula—misleading in its simplicity—that overlooks the realities of the drug trade.

At the same time, I wish to urge Congress to terminate the present 100:1 ratio. To my knowledge, no one who has studied the problem, including the Department of Justice, supports such a disproportionately high and unfair ratio. We all recognize, of course, that establishing drug penalties at such high levels may be politically popular. Congress, however, established the Sentencing Commission as a non-partisan institution designed to operate objectively and without regard to political trends. The present Commission, which includes members such as Wayne Budd and myself who have devoted substantial portions of our careers to effective law enforcement, has studied this problem carefully and unanimously rejected the 100:1 ratio. The Commission's rejection of 100:1 is supported by sound policy as well as common sense. For example, the 100:1 quantity ratio creates bizarre results and incentives within the criminal justice system. Under a 100:1 quantity ratio, a street dealer now faces as much as 78-97 months. This is much too high and, perversely, it is a far greater penalty than the law often imposes upon the distributor who sold him the powder for conversion into crack. In effect, the 100:1 ratio thereby encourages street dealers to avoid greater penalties by becoming high level powder distributors.

The 100:1 quantity ratio is also inconsistent with traditional theories of punishment. As some of you know, I am also a professor of law and so I feel bound to respect some of the black letter legal principles that I've taught in the classroom.

For example, because the present penalty for low level crack dealers is patently excessive, it overrides the principle of "just deserts." Further, because the penalty lacks legitimacy, perpetrators inevitably view it as unfair. As a result, rather than spend time in prison trying to rehabilitate oneself, an offender is more likely to wal-

<sup>17</sup> Under a ten-to-one ratio, 100 grams of crack would be punishable by 63-78 months. (See Table C, offense level 26). However, as the guidelines provide for a two level reduction for acceptance of responsibility, a defendant who pleads guilty may qualify for a range of 51-63 months. (See Table C, offense level 24).

<sup>18</sup> On the contrary, our *Special Report* found that "[c]learly the penalties (both statutory and guideline-based) apply equally to similar defendants regardless of race." *Special Report*, *supra* note 1, at 156.

<sup>19</sup> *Special Report*, *supra* note 1, at 156.

low in anger and bitterness over the obvious unfairness of his or her sentence. Inevitably, such anger and bitterness produces undesirable consequences. For example, such inmates are more likely to engage in violence or other socially inappropriate behavior. This result is obviously inconsistent with the incapacitation goal of punishment. Of greater concern, however, is the reality that these inmates one day will be released into society. Upon their return, rather than having achieved rehabilitation, they are more likely to explode with rage. In my judgment, excessive incarceration of these people today will inevitably foster excessively criminal behavior tomorrow.

For this reason, a vote in favor of 100:1 is not one that I view as "tough on crime." Rather, it offers the illusion of a short-sighted solution to a long-term problem. Furthermore, this illusion will come at a price. Federal prisons are already experiencing space problems. Such pressures will increase, as the 100:1 ratio inevitably produces longer prison terms. In response, the federal government will need to spend valuable dollars building new prisons.

My own view is that, rather than respond to political pressures, Congress ought to craft a principled solution to this problem. A quantity ratio in the range of five or ten to one provides a better framework for application of the guidelines.<sup>20</sup> Either of these ratios for crack offenses, when combined with the Commission's recently proposed enhancements to the guidelines, will produce an appropriately severe sentence consistent with all goals of the criminal justice system.

TABLE A-1.—DIFFERENTIAL SENTENCE EXPOSURE<sup>1</sup> FOR DRUG QUANTITY BETWEEN CRACK COCAINE AND POWDER COCAINE DEFENDANTS

[100-to-1 ratio]

Quantity	Drug	Offense level	Sentence <sup>2</sup> (in months)	Penalty <sup>3</sup> ratio
5 g .....	Powder Crack	12 26	10-16 63-78	6.30:1
25 g .....	Powder Crack	14 28	15-21 78-97	5.20:1
50 g .....	Powder Crack	16 32	21-27 121-151	5.76:1
100 g .....	Powder Crack	18 32	27-33 121-151	4.48:1
200 g .....	Powder Crack	20 34	33-41 151-188	4.58:1
500 g .....	Powder Crack	26 36	63-78 188-235	2.98:1
5 kg .....	Powder Crack	32 38	121-151 235-293	1.94:1

<sup>1</sup> Sentence exposure is identified using drug quantity alone.

<sup>2</sup> Criminal History Category I only.

<sup>3</sup> Penalty Ratio = Crack/Powder, lowest possible within-range sentence used.

<sup>20</sup> Alternatively, even under a one-to-one quantity ratio, the Commission might be able to develop an appropriately severe penalty scheme for crack by adding an automatic enhancement to the base offense level for cases involving either crack or the foreseeability that powder cocaine will be converted into crack. See Table C. Depending upon the number of levels chosen for this enhancement, high level crack offenders will generally face penalties approximately 25 percent (for a two level enhancement) to 55 percent higher (for a four level enhancement) than powder violators. Furthermore, this approach avoids the windfall presently enjoyed by high level powder distributors who often receive no added penalty for having sold powder that they knew would ultimately be converted into crack.



TABLE A-2.—DIFFERENTIAL SENTENCE EXPOSURE <sup>1</sup> FOR DRUG QUANTITY BETWEEN CRACK  
COCAINE AND POWDER COCAINE DEFENDANTS  
[5-to-1 ratio]

Quantity	Drug	Offense level	Sentence <sup>2</sup> (in months)	Penalty <sup>3</sup> ratio
5 g .....	Powder Crack	12 14	10–16 15–21	1.50 : 1
25 g .....	Powder Crack	14 18	15–21 27–33	1.80 : 1
50 g .....	Powder Crack	16 20	21–27 63–78	1.57 : 1
100 g .....	Powder Crack	18 26	27–33 33–41	2.33 : 1
200 g .....	Powder Crack	20 26	33–41 63–78	1.91 : 1
500 g .....	Powder Crack	26 28	63–78 78–97	1.24 : 1
5 kg .....	Powder Crack	32 34	121–151 151–188	1.25 : 1

<sup>1</sup> Sentence exposure is identified using drug quantity alone.

<sup>2</sup> Criminal History Category I only.

<sup>3</sup> Penalty Ratio = Crack/Powder, lowest possible within-range sentence used.

TABLE A-3.—DIFFERENTIAL SENTENCE EXPOSURE <sup>1</sup> FOR DRUG QUANTITY BETWEEN CRACK  
COCAINE AND POWDER COCAINE DEFENDANTS  
[10-to-1 ratio]

Quantity	Drug	Offense level	Sentence <sup>2</sup> (in months)	Penalty <sup>3</sup> ratio
5 g .....	Powder Crack	12 16	10–16 21–27	2.10 : 1
25 g .....	Powder Crack	14 20	15–21 33–41	2.20 : 1
50 g .....	Powder Crack	16 26	21–27 63–78	3.00 : 1
100 g .....	Powder Crack	18 26	27–33 63–78	2.33 : 1
200 g .....	Powder Crack	20 28	33–41 78–97	2.36 : 1
500 g .....	Powder Crack	26 32	63–78 121–151	1.92 : 1
5 kg .....	Powder Crack	32 36	121–151 188–235	1.55 : 1

<sup>1</sup> Sentence exposure is identified using drug quantity alone.

<sup>2</sup> Criminal History Category I only.

<sup>3</sup> Penalty Ratio = Crack/Powder, lowest possible within-range sentence used.

TABLE B.—COMPARISON OF DRUG QUANTITY LEVELS FOR MID- AND STREET-LEVEL  
CRACK AND POWDER COCAINE DEALERS <sup>1</sup>

[Fiscal year 1992 drug sample]

Role in instant offense	Crack cocaine	Powder cocaine
Street-level dealer .....	Base offense level = 26	Base offense level = 22
Quantity .....	5 to 20 grams	300 to 400 grams
Mid-level dealer .....	Base offense level = 32	Base offense level = 28
Quantity .....	50 to 150 grams	2,000 to 3,500 grams

<sup>1</sup> If the defendant was held accountable for more than one drug in the instant offense, the drug that produced the highest base offense level was the primary drug used.

Source: Stratified random sample of fiscal year 1992 drug cases, United States Sentencing Commission, MON fiscal year 92.

TABLE C.—DRUG QUANTITY RANGE <sup>1</sup> CORRESPONDING TO EACH BASE OFFENSE LEVEL,  
AND GUIDELINE RANGE, FOR VARIOUS CRACK: POWDER COCAINE RATIOS

Base offense level	Guideline range <sup>2</sup> (months)	Powder	Crack, 5:1	Crack, 10:1	Crack, 100:1	Powder quantity plus 2 levels
38 .....	235–293	150+ kg	30+ kg	15+ kg	1.5+ kg	50+ kg
36 .....	188–235	50–150 kg	10–30 kg	5–15 kg	500 g–1.5 kg	15–50 kg
34 .....	151–188	15–50 kg	3–10 kg	1.5–5 kg	150 g–500 g	5–15 kg
32 .....	121–151	5–15 kg	1–3 kg	500 g–1.5 kg	50–150 g	3.5–5 kg
30 .....	97–121	3.5–5 kg	700 g–1 kg	350–500 g	35–50 g	2–3.5 kg
28 .....	78–97	2–3.5 kg	400 g–700 g	200–350 g	20–35 g	500 g–2 kg
26 .....	63–78	500 g–2 kg	100 g–400 g	50–200 g	5–20 g	400–500 g
24 .....	51–63	400–500 g	80–100 g	40–50 g	4–5 g	300–400 g
22 .....	41–51	300–400 g	60–80 g	30–40 g	3–4 g	200–300 g
20 .....	33–41	200–300 g	40–60 g	20–30 g	2–3 g	100–200 g
18 .....	27–33	100–200 g	20–40 g	10–20 g	1–2 g	50–100 g
16 .....	21–27	50–100 g	10–20 g	5–10 g	500 mg–1 g	25–50 g
14 .....	15–21	25–50 g	5–10 g	2.5–5 g	250–500 mg	25 g or less
12 .....	10–16	25 g or less	5 g or less	2.5 g or less	250 mg or less	n/a

<sup>1</sup> Each drug quantity range includes at least the first listed quantity but less than the second listed quantity.

<sup>2</sup> Criminal History Category I.

TABLE D.—DRUG QUANTITY RANGE <sup>1</sup> CORRESPONDING TO EACH BASE OFFENSE LEVEL,  
AND GUIDELINE RANGE, FOR HEROIN, METHAMPHETAMINE, AND LSD

Base offense	Guideline range	Heroin	Methamphetamine	LSD
38 .....	235–293	30+ kg	30+ kg	300+ g
36 .....	188–235	10–30 kg	10–30 kg	100–300 g
34 .....	151–188	3–10 kg	3–10 kg	30–100 g
32 .....	121–151	1–3 kg	1–3 kg	10–30 g
30 .....	97–121	700 g–1 kg	700 g–1 kg	7–10 g
28 .....	78–97	400–700 g	400–700 g	4–7 g

TABLE D.—DRUG QUANTITY RANGE<sup>1</sup> CORRESPONDING TO EACH BASE OFFENSE LEVEL, AND GUIDELINE RANGE, FOR HEROIN, METHAMPHETAMINE, AND LSD—Continued

Base offense	Guideline range	Heroin	Methamphetamine	LSD
26 .....	63–78	100–400 g	100–400 g	1–4 g
24 .....	51–63	80–100 g	80–100 g	800 mg–1 g
22 .....	41–51	60–80 g	60–80 g	600–800 mg
20 .....	33–41	40–60 g	40–60 g	400–600 mg
18 .....	27–33	20–40 g	20–40 g	200–400 mg
16 .....	21–27	10–20 g	10–20 g	100–200 mg
14 .....	15–21	5–10 g	5–10 g	50–100 mg
12 .....	10–16	5 g or less	5 g or less	50 mg or less

<sup>1</sup> Each drug quantity range includes at least the first listed quantity but less than the second listed quantity.

The CHAIRMAN. Mr. Budd, we will turn to you at this time.

#### STATEMENT OF WAYNE A. BUDD

Mr. BUDD. Thank you very much, Mr. Chairman and members of the committee. I appreciate your allowing me to be here today with you.

As Judge Conaboy stated, I was appointed U.S. attorney in 1989 by President Bush, and subsequently in 1992 he appointed me as the Associate Attorney General of the United States, which, as you know, is the number three position in the Department of Justice. You should know that my first priority and my primary focus as a prosecutor was drug crime. So, when I listen to Senator Feinstein this morning, I know, as she does firsthand, the destruction that drugs bring on a community.

After I was sworn in as a U.S. attorney, I visited with community leaders, with the clergy, and social activists from around Massachusetts, and they told me about the seemingly endless problems of drugs and violence in the inner-city communities. Really, they asked for Federal law enforcement resources to combat these problems.

They told me about the devastating effects that drugs have on the minority community and, in particular, we discussed the devastation that comes with crack cocaine. So as a result of those meetings, my own experience, and my commitment to strong law enforcement, we created in Massachusetts a Federal, State, and local task force which was an unprecedented undertaking at the time, and this task force has brought to justice some of the largest drug traffickers in the history of New England.

If you have any questions about whether I believe in harsh sentences for drug criminals, just ask some of those dealers. Most of these drug traffickers, the major ones that we prosecuted, are in prison for life. And you know what? That is the way it ought to be. It should be very clear that I am all for dealing very harshly with major drug dealers.

But just as I am devoted to strong law enforcement, I am also committed to parity, fairness, and consistency in Federal sentencing practices. This is the guiding philosophy of the sentencing

guidelines and it is why I was honored to take a position on the Sentencing Commission late last year.

As an attorney who has practiced for many years in the Massachusetts courts, as well as in the Federal system, I know that parity isn't always achieved, particularly in the area of sentencing, and I am concerned that this occurs with judges. Likewise, I am aware that law enforcement's focus, as well as prosecutorial charging decisions and sentencing decisions, often result in uneven treatment for minorities for many, many different reasons, not all of them good.

On the issue of cocaine sentencing policy, while we found at the Commission that there was no racially motivated intent in the creation of the 100-to-1 quantity ratio, there can be no doubt that the higher penalties for crack offenders fall disproportionately on minority defendants. We prepared a graph that illustrates this disparate impact.

Now, as you can see from the chart being displayed, looking at the right, better than 90 percent of all crack cocaine offenders sentenced in Federal court—and I emphasize Federal court—in the year 1994 were black—over 90 percent. Six percent were Hispanic and 4 percent were white. Now, these figures are even more startling when you take into consideration that, as has been mentioned before, surveys show that the majority of crack users are white.

Now, compare these numbers, in looking again at the chart on your left, with the percentage of powder cocaine defendants. Thirty percent of the powder cocaine defendants were black, 43 percent Hispanic, and 26 percent white. The depth of the adverse impact becomes that much more evident when you consider on many, many occasions there is discretion in law enforcement as to whether or not to take these cases to the State courts, where crack and powder penalties are almost invariably less severe and seldom involve a quantity ratio, or to the Federal courts where crack penalties, as you are aware, are staggeringly more steep.

While the Congress has attempted to frame a national policy that would be applied uniformly across the country in all similar drug cases, we find that this application is not, in fact, occurring. Let me give you an example. Some rural districts have experienced a considerably higher proportion of Federal crack cocaine convictions than larger urban districts. The Eastern District of New York, which includes Brooklyn, reports a much lower number of Federal crack sentences than West Virginia, where the population is a fraction of the size of Brooklyn. This is so even though the New York City Police Department's data reflects that 46 percent of all drug arrests in recent years were crack cocaine-related.

But this idea of adverse impact and disparate prosecution practices doesn't really tell the whole story. The Commission's study of cocaine sentencing policy examines the pharmacology of cocaine, the way it is used and marketed, and we looked very hard for a justification for the 100-to-1 quantity ratio. We found unanimously that there was no empirical or policy justification for it. The point of all of this is simply that the 100-to-1 quantity ratio is unfair and it is unwarranted, and as has been pointed out, we found this unanimously to be the case.

That having been said, the Commission found that, as has been firmly stated in our report and has been gone over here, that there are certain offense and offender characteristics that apply more often to crack offenders, as opposed to powder offenders, and which should result in a punishment differential.

But in determining what this differential should be, we should remember the fact that the people who are prosecuted for crack cocaine offenses are most often the low-level drug dealers who buy powder cocaine from the bigger guys and cook the crack themselves. The policy of punishing these offenders with sentences usually disproportionate to those for their suppliers runs totally counter to the usual law enforcement policy of seeking higher penalties for those who organize and lead drug rings and who typically are responsible for bringing greater quantities of illegal substances into our communities.

The Commission's proposals, which, I should tell you, have been endorsed, in principle, by the American Bar Association's House of Delegates just yesterday, include a guideline amendment which equates base sentences for crack and powder cocaine offenders, and appropriate enhancement for case-specific harms that will eliminate anomalies.

It is a sentencing system that targets both the predatory street offender and the large-scale trafficker, and yet restores fundamental fairness to sentencing law. It is true that our report found that crack is associated with greater dangers than powder cocaine, but the Commission has addressed these greater dangers with specific aggravating factors, as Judge Conaboy has stated earlier.

So, in closing, I want to speak to you just for a moment personally about this issue. I am the son of a police captain and I have spent my professional life as a lawyer and as an officer of the court. I believe in public service, and despite what the polls tell us about the current distaste for government, I believe in the virtues of public life. I have spent a lifetime trying to live up to these virtues. There have been several events that have challenged and defined my commitment to these virtues.

For me, one of those moments came when, as the U.S. attorney for Massachusetts, I prosecuted Darrell Whiting, a notoriously vicious drug dealer who preyed on the inner-city community in Boston. I believe that our work on that prosecution helped to make the community a little safer and helped me to fulfill to some degree the challenge of public service.

To me, this issue today presents another one of those defining moments. It may not be as dramatic, it may not make for great theater, but I believe it is just as important. If we are going to do our jobs properly, we must question why over 90 percent of crack offenders are black, and why this group of offenders are all receiving disproportionately higher sentences. We must try to get some real answers and if the answers we find are unsatisfactory, we must be a driving force to make the necessary changes in order to achieve parity, fairness, and consistency. We can't simply sit back and say this isn't the right time, or it is too risky to make a change.

The legislation proposed by the Department of Justice which largely keeps in place the status quo is plainly and simply the

wrong answer. In light of the Department's own statements that the current policy is wrong, its legislative proposal, with due respect to the Department, is neither responsive nor responsible. As the Commission, we have stepped up to the plate and we have taken a position on responsible changes. I would ask that this committee and the Senate do the same.

Thank you again for having me here today.

[The prepared statement of Mr. Budd follows:]

#### PREPARED STATEMENT OF WAYNE A. BUDD

Mr. Chairman, members of the Committee: it is a pleasure for me to be here today with my colleagues and friends Chairman Conaboy and Commissioner Goldsmith.

As the Chairman stated, I was appointed United States Attorney for the District of Massachusetts by President Bush in 1989, and subsequently in 1992, he appointed me Associate Attorney General of the United States. My first priority and my primary focus as a prosecutor was drug crime. I know firsthand the destruction that drugs bring on a community. After I was sworn in as United States Attorney, I visited with community leaders, with clergy, and with social activists from around Massachusetts. They told me about the seemingly endless problems of drugs and violence in their inner city communities and they asked for federal law enforcement resources to combat these problems. They told me in particular about the devastating effects drugs have on the minority community, and we discussed the devastation that comes with crack cocaine. As a result of my meetings, my own experience, and my commitment to strong law enforcement, we in Massachusetts created a federal/state/local drug task force, an unprecedented undertaking at the time. Since its creation, that task force has brought to justice some of the biggest drug dealers in New England. And if you have any questions about whether I believe in harsh sentences for drug criminals, just ask those drug dealers. Some of the major traffickers we prosecuted are in prison for life. And that's the way it ought to be. It should be very clear that I'm all for dealing harshly with major drug traffickers.

But just as I am devoted to strong law enforcement, I am also committed to parity, fairness, and consistency in federal sentencing practices. This is the guiding philosophy of the sentencing guidelines, and it is why I was honored to take a position on the Sentencing Commission late last year. As an attorney who has practiced for many years in the Massachusetts courts as well as in the federal system, I know that parity isn't always achieved. I'm concerned that many times judges are inclined to give a break to defendants who look more sympathetic or who share with them a similar ethnic, racial, cultural, or economic background. That simply has been my experience in some cases. Likewise, there are instances when prosecutorial charging decisions and sentencing recommendations often result in uneven treatment for minorities, perhaps for some of the same reasons.

On the issue of cocaine sentencing policy, while the Commission found no racially motivated intent in the creation of the 100-to-1 quantity ratio, there can be no doubt that the higher penalties for crack offenders fall disproportionately on minority defendants. We have prepared some graphs that illustrate this disparate impact. As you can see on the chart now being displayed, better than 90 percent of all crack cocaine offenders sentenced in federal court—and let me emphasize *federal court*—in 1994 were Black; six percent were Hispanic, and four percent were White. These numbers are even more startling when you take into consideration that surveys show that the majority of crack users are White. Now compare these numbers with the percentage of powder cocaine defendants. Thirty percent of the powder cocaine defendants were Black, 43 percent Hispanic, and 27 percent White.

The depth of the adverse impact becomes that much more evident when you consider that on many, many occasions, there is discretion in law enforcement as to whether to take cases to the state courts, where crack and powder penalties are almost invariably less severe and seldom involve a quantity ratio, or to the federal courts where crack penalties are staggeringly more steep. While Congress attempted to frame a national policy that would be applied uniformly across the country in all similar drug cases, the Commission's research suggests that uniform application is not occurring. The present record shows vast and surprising differences in prosecution practices. Many rural federal districts, like the Central District of Illinois, have experienced a considerably higher proportion of federal crack cocaine convictions than largely urban districts, like the Chicago-driven Northern District of Illinois. A similar example can be found in the Eastern District of New York which includes Brooklyn. This district reports a much lower number of federal crack sentences

than Northern and Southern West Virginia—where the population is a fraction of the size of Brooklyn's. This is so even though, according to New York City Police Department data, 45.8 percent of all drug arrests in recent years were crack cocaine related.

The adverse impact and disparate prosecution practices, however, do not tell the whole story. The Commission's study of cocaine sentencing policy examined the pharmacology of cocaine, the way it is used and marketed, the violence associated with its use and marketing, as well as the enforcement priorities surrounding cocaine. We looked hard for a justification for the 100-to-1 quantity ratio, and found, unanimously, that there was no empirical or policy justification for it. The point of all this is that the 100-to-1 quantity ratio is simply unfair and unwarranted. The Commission unanimously found this to be the case. The gross unfairness may not have been intended at the time the ratio was created, but it certainly has worked out that way in practice.

That having been said, I must reiterate something Chairman Conaboy stated. The Commission found, and it is firmly stated in our report, that there are certain offense and offender characteristics that apply more often to crack offenders as opposed to powder offenders and which should result in a punishment differential. But in determining the base sentences to which we will add the enhancements, we all must remember that crack cocaine and powder cocaine are derived from the same drug. And we must remember that without powder cocaine, we would not have crack—crack is prepared by simply cooking powder with baking soda and water. It does not take great skill to prepare it, and the conversion is most often done at the lowest rungs of the distribution chain. The result is that the people being prosecuted for crack cocaine offenses are most often low-level street dealers who buy powder cocaine and cook the crack themselves. The policy of punishing these offenders with sentences hugely disproportionate to those for their suppliers runs counter to the usual law enforcement policy of seeking higher penalties for those who organize and lead drug rings and who typically are responsible for bringing greater quantities of illegal substances into our communities.

The Commission's proposed guideline amendment, which equates base sentences for crack and powder cocaine offenders while at the same time providing appropriate enhancements for case-specific harms, will eliminate this anomaly. It is a sentencing system that targets both the predatory street offender and the large scale trafficker and yet restores fundamental fairness to sentencing law. It is true that our report found that crack is associated with greater dangers than powder cocaine. And the Commission has addressed these greater dangers with specific aggravating factors. As Chairman Conaboy stated earlier, under the amended sentencing policy, taking into account both base sentences and enhancements, average sentences for crack cocaine offenders will still remain significantly higher than sentences for powder offenders. Because certain specific harms are more commonly associated with crack cocaine than powder cocaine, at all quantity levels, crack offenders on average will receive significantly greater sentences than powder offenders. When a firearm is present in a cocaine offense, when a defendant uses a juvenile in a cocaine crime, when a gang is involved, the guidelines provide for stiff sentences regardless of whether it is crack or powder cocaine or for that matter any other drug.

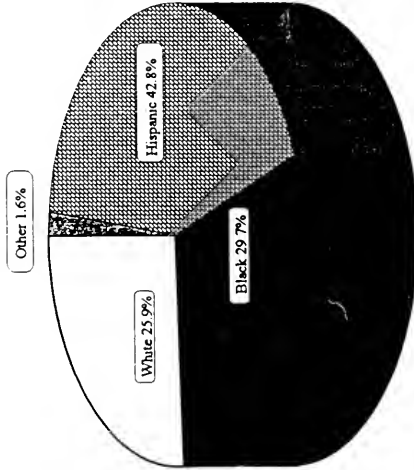
In closing, I want to speak personally about this issue. I am the son of a police captain and have spent my professional life as a lawyer and as an officer of the court. I believe in public service, and despite what the polls tell us about the current distaste for government, I believe in the virtues of public life. I have spent a lifetime trying to live up to these virtues. There have been several events that have challenged and defined my commitment to these virtues. For me, one of those moments came when as United States Attorney I prosecuted Darrell Whiting, a notoriously vicious drug dealer who preyed on the inner city community in Boston. I think our work on that prosecution helped to make the community a little safer and helped me to fulfill the challenge of public service. To me, this issue today presents another one of these defining moments. It may not be as dramatic; it may not make for great theater; but I believe it is just as important. If we are going to do our jobs properly, we must question why over 90 percent of crack offenders are Black and why this group of offenders are all receiving disproportionately high sentences. We must get to some real answers. And if the answers we find are unsatisfactory, we must be a driving force to make the necessary changes in order to achieve parity, fairness, and consistency. We cannot simply sit back and say "this isn't the right time," or "it's too risky to make a change." The legislation proposed by the Department of Justice, which keeps in place the status quo, is plainly and simply the wrong answer. In light of the Department's own statements that the current policy is wrong, its legislative proposal is neither responsive nor responsible. At the Commission, we

# Chart III

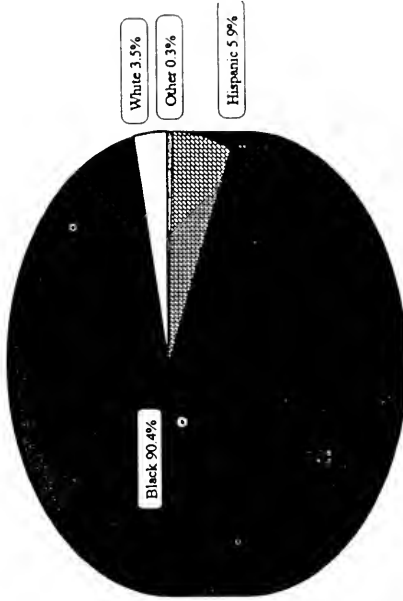
## Race of Powder and Crack Cocaine Defendants

(October 1, 1993 through September 30, 1994)

### Powder Cocaine



### Crack Cocaine



SOURCE: U.S. Sentencing Commission, 1994 Datafile, MONFY94.

have stepped up to the plate, and we have taken a position on responsible changes. I strongly urge this Committee and the Congress to do the same.

I thank you again for giving me the chance to testify before you this morning. I would be happy to respond to any questions.



The CHAIRMAN. Well, thank you, Commissioner Budd. We appreciate all three of you and the testimony you have given. We know that there is a disparity here. Like I say, and said in my opening remarks, I tend to agree that crack cocaine should be treated differently from powder cocaine, but I have been interested in what you have had to say.

Mr. Budd, at least one argument that may be appropriate is that the arrest of each trafficker disproportionately benefits minority and inner-city neighborhoods because by getting rid of those traffickers, we are helping those neighborhoods. So there is the other side of that coin, too, that we are concerned about.

Let me just ask you a question or two. Crack users apparently use as much of the drug as they can buy and the only thing that stops them from killing themselves is that they run out of money, generally. A stiff prison sentence being the market disincentive that it is, what I am worried about is lowering crack penalties would seem to make crack even more widely available, thus increasing its use.

Now, did the Commission study the effect that reducing crack penalties would have on the overall use of crack? Was that part of the Commission study?

Mr. BUDD. I should say that, to my knowledge, it was not.

The CHAIRMAN. Yes, that was my understanding. As I read the report, the 242-page report, you did not discuss that or really study that. It seems to me that is pretty important before you make a final decision on what really needs to be done.

Mr. BUDD. May I respond, in part, Mr. Chairman, to your earlier statement—the devastation caused, as you suggested, in the black communities by what might be styled crack traffickers who are people of color?

The CHAIRMAN. Or anybody.

Mr. BUDD. I agree. I can't speak for the black community as a monolithic society, but I can say this, that my own experiences have been that while the community wants drug dealers, be they crack dealers, powder dealers, heroin dealers, dealt with harshly, they do not want them dealt with unfairly, and that seems to be the problem here, Mr. Chairman, to the end that those further up the line are indeed receiving less punishment than those how are the lower-rung dealers. That is where much of the problem comes up. Some of our youth who are first-time offenders get caught, make a mistake, and should be punished, but the punishment should be fair.

The CHAIRMAN. Yes; I don't like that factor. We ought to find some way of getting around that. There is no question about that. But, you know, if we permit the Commission to lower sentences for crack, it seems to me we are sending the wrong message to the families and youth of our inner cities. I mean, that is the thing that comes to my mind, so I am really concerned about this.

I respect each of you, as you know. I know this is a difficult job. I know that there are some injustices in sentencing, and yet as one of the people who helped put this all together, I have to say I am very distressed about that and concerned about it because I see sometimes a courier going to jail for a lot longer time than the actual trafficker because the trafficker may be cooperative or some-

thing like that and the poor courier gets stuck with the 10-year sentence, where the trafficker gets off with a much lesser sentence. We have got to find some ways around that.

Let me just ask you, Judge Conaboy—and we appreciate your extensive remarks here today. They have been helpful to the committee, but I just want to read some sections of the report from this past February, "Cocaine and Federal Sentencing Policy." I just want to ask you if you associate yourself with a number of what I view as the report's key findings, so let me just read those and you tell me whether you agree or not.

The first quote would be, and this is from page vi:

The greater the intensity of cocaine's psychotropic effects and the shorter their duration, the greater the likelihood that cocaine use will lead to dependence and abuse for a given quantity of cocaine. Smoking crack cocaine or injecting powder cocaine produces the most intensive physiological and psychotropic effects. However, the ease of smoking, compared to the greater difficulty and unpleasantness involved in injecting any substance suggests that smoking is more tempting for the first-time user and more appealing for repeat use than is injection.

Do you agree with that finding?

Mr. CONABOY. Well, I couldn't follow you in the book, but I think I know what that refers to and I agree with it, in a sense. I think we have to realize that the traffickers, the people who produce and sell this thing, several years ago realized that there was a market out there for any kind of drug if it was cheap. That is how they designed crack cocaine; to appeal to that market that didn't have a lot of money, but was ready to buy drugs of any kind. That is how crack cocaine was developed. They began to spread it around these neighborhoods free just to hang people on it.

The CHAIRMAN. Well, sure; basically, that conclusion of the Commission was that it was a finding that crack cocaine is a more intense and more attractive form of cocaine utilization.

Mr. CONABOY. It is easier to use and it is cheaper. There is no question about that, Mr. Chairman.

The CHAIRMAN. OK; let me just ask you about a second quote and then I think my time is up.

Crack cocaine's ease of manufacture and relatively low cost per dose have made it more readily marketable than powder cocaine to large numbers of lower-income people.

Do you agree with that finding?

Mr. CONABOY. Yes, yes.

The CHAIRMAN. I think so. And then the third one is:

The market is dominated by a "cottage industry" of small-group and freelance distributors, a deviation from the normal pattern. Because these smaller-volume distributors now are competing in a market that no longer is expanding, this may indicate that a higher level of violence will continue to be associated with crack cocaine distribution.

I take it you agree with that as well.

Mr. CONABOY. Well, those are speculations we made, and it goes back to one of the other questions you just asked a minute ago about whether or not there is a relationship between the higher penalties and reduced use, and we had no testimony of that. There is no evidence to indicate that the higher penalties that we have been imposing have reduced use or the distribution of cocaine in this country. I don't know what that tells us, but that is a fact.

The CHAIRMAN. But the finding is that the higher level of violence comes from crack cocaine rather than powder cocaine.

Mr. CONABOY. There seems to be associated with cocaine use and distribution more violence, but we also know that there is more violence in those areas generally among criminals in the poor and the disadvantaged areas.

The CHAIRMAN. I understand.

Mr. CONABOY. I don't think you need to be a rocket scientist to understand that. We see that as judges all the time that there is more violence in the areas—there is more desperation in the areas of this country where crack is used than there is in other areas.

I think the thing that Commissioner Budd mentioned about the chart here that shows 51 percent of the crack is used by the white population—but they use it in areas where there isn't the desperation. It is used in offices and in nice neighborhoods where a lot of trouble isn't caused. I don't mean to sound preachy about this because God knows I have no right to preach to anybody, but this is one of the areas where I worry about any ratio at all because it might reflect some of the things Commissioner Goldsmith mentioned. It might reflect a relationship between seriousness and nonseriousness, but the implementation is what we worry about.

I was on a radio show out in Los Angeles, CA, Senator Feinstein. And in Los Angeles, CA, there has not been one white conviction, not one, for crack cocaine trafficking under this law. Now, I am not about to say what that tells us, but it tells us something, and it is a worry that whatever ratio you have, if people want to, they can use it in a way that turns out to be unfair.

The CHAIRMAN. Well, I think there ought to be more white convictions. If they are dealing in this stuff, we ought to go after them. On the other hand, there ought to be convictions of whoever is spreading this stuff around because it is killing our kids.

Mr. CONABOY. I agree with that.

The CHAIRMAN. Just one last quote I would like to get out before I turn to Senator Feinstein. This is the fourth quote from the report.

While it is true that powder cocaine and crack cocaine pharmacologically are the same drug, important distinctions between the two may warrant higher penalties for crack than powder.

You have kind of indicated that that may be so, but you are concerned about these differences.

Mr. CONABOY. And our guidelines will provide for that, yes.

The CHAIRMAN. OK; well, let's turn to Senator Feinstein, and then we will go to Senator Kennedy.

Senator FEINSTEIN. Let me ask a couple of questions. As you may have gathered, I have got some pretty strong feelings about this. Did the Commission to any extent really investigate the cottage industry of crack manufacturing in the United States?

Mr. BUDD. We did look at that.

Senator FEINSTEIN. And then you found that anybody can do it; that all of the component parts are available in a supermarket to cook crack.

Mr. CONABOY. A very simple process.

Senator FEINSTEIN. It is very simple, and then you also took a look at the relative street prices of cocaine and crack. In your find-

ings, how do you differentiate the difference between the street price of cocaine, the small amount it takes to make it, and then the street price of crack? What did you find were the figures?

Mr. CONABOY. Well, the cost of acquiring a small amount of cocaine is much higher than the cost of acquiring a small amount of crack.

Senator FEINSTEIN. But let's say you had \$600 and you bought for \$600. What could you sell that cocaine for as crack?

Mr. CONABOY. As crack?

Senator FEINSTEIN. Yes.

Mr. CONABOY. Well, I think those calculations are in here somewhere, and I really hesitate to answer that.

Senator FEINSTEIN. The last time I looked, and this was before I left San Francisco in 1988, the ratio was about \$600 to \$3,000 on the street. Now, that may have changed since then. That is why I am asking.

Mr. BUDD. Senator, if I could take a crack at a response to your question, the 5 grams of crack for which there is now a minimum mandatory penalty of 5 years, on the street would cost about \$750. In order to get that same 5-year minimum mandatory penalty, as the law is now framed, one must have 500 grams of powder cocaine, which is worth thousands and thousands of dollars, perhaps up to or beyond \$50,000.

Senator FEINSTEIN. To go back, Mr. Budd, to the 5 grams, what would the 5 grams, translated into crack, be on the street?

Mr. BUDD. Five to 10 doses, as our report reflects at page 85; 5 to 10 doses for the 5 grams. Its equivalent, if you went on the minimum mandatory sentencing, Senator, to 500 grams of powder cocaine, which would translate into thousands of doses and would be worth upwards, as I suggested earlier, of \$50,000 and beyond, and that is part of the disparity that is so troubling.

Senator FEINSTEIN. Right; let me ask another question. One of the points that you make is the disparity of sentencing. I wonder if you took a look at bail in this issue, because on the State level bail is available and one of the problems that neighborhoods have, and I remember this well, is someone is arrested for sale of crack cocaine, comes right back out and looks for who it is that turned them in.

At the Federal level, if there is a threat of violence, as I understand it, the judge has the option of denying bail, and so many more cases are going to be brought federally because very often the crack dealer is very interested in who it is that has been responsible for his arrest.

Mr. BUDD. Senator, as a Federal prosecutor, oftentimes we would seek a no-bail situation for just the reasons that you have outlined. On the other hand, that crack dealer who has got the 5 grams of crack gets it from somebody higher up who wouldn't be subjected to the same standard.

Let's just use by way of example a middle-level powder dealer who had 400 grams of powder cocaine that he was prepared to sell to that crack dealer. He wouldn't have the same level of penalty that the crack dealer would be exposed to, and that being coupled, Senator, with the fact that law enforcement has significant charging discretion. The State authorities and local authorities can say,

hey, let's take this guy Federal; no, let's take this guy State. So it again works to what concerns me the most, and I hate this stuff, Senator. Trust me, I hate it, but it is unfair.

Senator FEINSTEIN. So, by and large, Mr. Budd, in the Federal law you are going to get it the more violence-prone dealer, it would seem to me, because of that option and that discussion.

Mr. BUDD. Senator, I wish I could say with conviction that is the case. I am afraid the discretion that is used oftentimes by law enforcement and prosecutors is not that well-defined.

Senator FEINSTEIN. So you are saying that U.S. attorneys are spending their time finding petty crack dealers to prosecute for Federal offenses?

Mr. BUDD. I am suggesting, Senator, that I won't speak for what the U.S. attorneys are doing as a matter of policy, but I will say that the majority of crack defendants are the smaller dealers. They are not major dealers. They are the lowest rung on the distribution chain. Does that speak well of policy? I am not so sure, and I won't make that judgment.

Senator FEINSTEIN. Yes, but doesn't the U.S. attorney generally go for the bigger dealer?

Mr. BUDD. As a rule, that is the case. However, we have this sentencing policy, the sentencing law that is now in effect, that is so subject to being abused intentionally or otherwise that it works the unfairness that you can see from the chart that we have here. You can see who that becomes visited upon, and it seems to be very unfair.

Senator FEINSTEIN. Well, the point I am trying to make is when I was mayor of San Francisco, I tried to get the Federal U.S. attorney more involved in some of this because of what it was doing in the neighborhoods. They were not interested because they said their responsibility was the big fish and unless the case was big enough, they weren't going to go into it. So, that is my sort of street experience.

Now, I come here and the thrust of the testimony is all of these people are minor offenders. I don't for a moment believe that. I don't for a moment believe that in Federal prison, the crack dealers that are there are petty dealers, based on my experience in California.

Mr. BUDD. I respect that experience, Senator, and I have no reason to doubt the accuracy of it. However, as I have pointed out in the course of my testimony, taking Brooklyn, NY, where the New York police form their own data tell us that 46 percent of drug-related crime is crack-involved—yet, there are less prosecutions there, for whatever reasons the U.S. attorney has there, than in West Virginia, which is much, much smaller in terms of population. West Virginia has greater crack prosecutions, a greater number.

It is that kind of discretion where the law can be worked to the disadvantage of certain segments of the community. That is not to say that they should go unpunished, but they should be punished fairly.

Senator FEINSTEIN. Thank you.

Mr. BUDD. Thank you, Senator.

Senator FEINSTEIN. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Senator Kennedy?

**STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR  
FROM THE STATE OF MASSACHUSETTS**

Senator KENNEDY. First of all, I want to join in welcoming all of you, the representatives of the Commission, and also commend the important and good work that you are doing to try and make sentencing, which is a very key element in the whole criminal justice system, fairer and more understandable, and increase confidence of the American people in sentencing so they do understand it and they do support it, and that its implementation is going to be fair and just.

I want to thank all of you very, very much. I want to express a warm word of welcome to Wayne Budd, Mr. Chairman. He has been a longtime friend. I speak for everyone in Massachusetts. I have enormous respect for his job as U.S. attorney, and also in the Justice Department. He came in at a very difficult time in Justice Department history and had just an extraordinary record. He has been very, very successful in committed public service, and I am just delighted that he is serving on this Commission. He brings a wide range of different experiences, and I think all of us from his testimony today can understand that.

I am sure the Commission saw the New York Times stories today about "More in U.S. Are in Prison, Report Says," and also in the Washington Post, pointing out that now the number of Americans under the control of the criminal justice system reached 5 million last year, including 1.5 million inmates in Federal and State prisons and local jails, and another 3.5 million convicted criminals on probation. If we continue at this level, we are going to have more in prison just after the turn of the century than we are going to have in universities in our country.

I would put both articles, if I could, in the record, Mr. Chairman.

The CHAIRMAN. Without objection.

[The articles follow:]

# THE FEDERAL

8-10-95

## NATION'S PRISON POPULATION SOARS ABOVE 1 MILLION

Associated Press

Already bulging, state and federal prisons squeezed in 83,000 more inmates last year for the second-biggest increase ever and a record population of more than 1 million in such institutions.

The prison populations, up 8.6 percent overall, rose by at least 10 percent in 16 states last year. The largest increases occurred in Texas, up 28.5 percent, and Georgia, up 20.3 percent, according to a Justice Department report released yesterday.

Eight state prison systems were so crowded that they sent at least 10 percent of their inmates to local jails last year, the study found, noting that Louisiana topped the list with 33.5 percent of its inmates in local jails. On average, the states operated prisons at least 17 percent above capacity, using the states' largest capacity measurements. Federal prisons were at 25 percent over capacity.

The 958,704 inmates in state prisons and 95,034 in federal prisons last year, up 83,294 over the previous year, accounted for about two-thirds of the nearly 1.5 million people incarcerated in the United States, the study said.

The remaining one-third were in local jails, which generally hold people awaiting trial or serving sentences of less than a year. The state figure includes state inmates held in jails because of prison overcrowding.

Almost 4.9 million people were under some correctional supervision, with 2.8 million on probation and 671,000 on parole.

The largest-ever one-year increase in state and federal prison populations occurred in 1989, when the number grew by 84,764, said the study, performed by the Bureau of Justice Statistics.

While the average sentence length and time served has remained stable for state prisoners, tighter federal sentencing guidelines increased the median time served in federal prisons from 15 months in 1986 to 24 months in 1992, the study found.

Violent offenders accounted for the largest growth in state and federal prisons from 1980 to 1993, increasing by 225,368 to a total of 405,240. The next largest growth in the combined prison populations was for drug offenders, up 210,654 to 234,554.

The incarceration rate for prisoners sentenced to more than a year reached 359 per 100,000 U.S. residents in 1993, compared with 139 in 1980. At the end of 1993, one of every 189 U.S. residents was in prison, compared with one of every 453 residents at the end of 1980.

Texas led all states with an incarceration rate of 636 inmates per 100,000 residents. North Dakota had the lowest rate, 78 inmates per 100,000 residents.

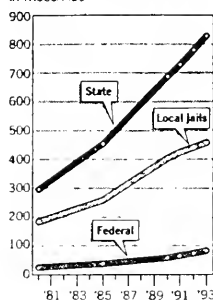
California and Texas, containing a total of almost one-fifth of the nation's population, combined to house more than one in five of the nation's state and federal inmates.

As of 1993, the incarceration rate for blacks was seven times that for whites—1,471 black prisoners per 100,000 black residents compared with 207 whites per 100,000 white residents. The rate for Hispanics, who are included in the black and white totals, was 529 per 100,000 Hispanic residents.

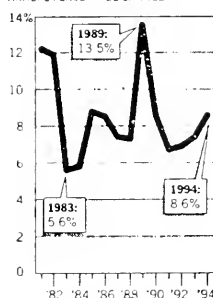
From 1980 to 1993, the number of black male inmates increased by 217 percent, while the number of white male inmates rose 163 percent. The number of black female inmates rose 343 percent, and the number of white female inmates grew by 327 percent. Figures for Hispanic males and females were not available.

### ►BEHIND BARS

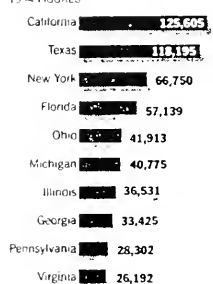
Total number of people incarcerated in thousands



Growth of federal prison population ANNUAL PERCENTAGE CHANGE



States with largest prison populations 1994 FIGURES



SOURCE: Bureau of Justice Statistics

■ At the end of 1980, 1 in every 453 U.S. residents were incarcerated. By the end of 1993, that figure grew to 1 in every 189.

■ The 1994 increase translates into a nationwide need to confine an additional 1,602 inmates each week.

■ Regionally, during 1994 the percentage increase in the number of sentenced prisoners was highest in the South, up 13.1 percent

■ More than a quarter of the state and federal prison inmates were in prison for drug offenses (234,000 prisoners) in 1993

■ States reported operating between 17 percent and 29 percent over capacity. The federal system was operating at 25 percent over capacity

■ The number of female inmates grew 10.6 percent last year compared with an 8.5 percent increase among male inmates. On Dec 31, 1994, there were 64,403 women in state and federal prisons, 6.1 percent of all prisoners.

# More in U.S. Are in Prisons, Report Says

## Number of Inmates at the End of 1994 Has Tripled Since 1980

By FOX BUTTERFIELD

The number of Americans under the control of the criminal justice system reached 5 million last year, including a record 1.5 million inmates in Federal and state prisons and local jails and another 3.5 million convicted criminals on probation and parole, the Justice Department said today in the most comprehensive report ever done on the scope of law enforcement network.

If the current trend continues — as law enforcement experts and criminologists interviewed today predicted it would — the number of Americans behind bars or on probation or parole will soon approach the 6 million students enrolled full-time in four-year colleges and universities nationwide; within a decade the number of people behind bars will exceed the entire New York City population, currently about 7.3 million.

During 1994, the number of inmates in Federal, state and local prisons increased by more than 1,600 a week, and the number of people incarcerated at year's end had tripled since 1980, according to the study, by the Bureau of Justice Statistics, a research arm of the Justice Department.

There are wide divergences among experts on how fast the prison population will grow, with estimates depending both on the crime rate and changes in legislation. This year, for instance, the Republicans' Contract With America calls for providing possible billions of dollars in Federal financing for state prison construction if states lengthen the required amount of time inmates serve to at least 85 percent of their sentences, a provision that Florida recently met.

Criminologists and politicians today offered conflicting opinions about whether the large increase in the number of Americans behind bars had had any effect on the crime rate. The Federal Bureau of Investigation reported in May that the rate of violent and serious crimes had dropped 3 percent in 1994, the third consecutive year of decline. Some cities, including New York, have reported a significant decrease in homicide.

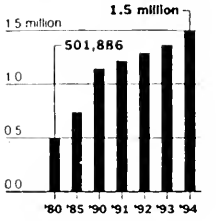
Representative Bill McCollum, the Florida Republican who is chairman of the House subcommittee on crime, called today's report was "encouraging" and said it showed that Congress's efforts to stop crime by lengthening prison sentences and building more prisons were beginning to work.

"If you can get these violent criminals to serve more time, you will inevitably reduce the violent crime rate," Mr. McCollum said. "Anyone who is locked up will not commit a crime."

Alfred Blumstein, a criminologist at Carnegie Mellon University, acknowledged that the increase in imprisonment clearly removed some criminals from the streets and meant that fewer murders would be committed. But he said that since

### KEEPING COUNT

#### Number of Inmates In Federal, State And Local Prisons



The New York Times

1985 there had been only a 10 percent reduction in the homicide rate among adults over the age of 24, a disproportionately small gain when measured against the vast increase in the number of prisoners.

"We should think very hard about the trade-off" between the tripling in the prison population and the relatively small decrease in crime, Professor Blumstein said.

Today's report found that there were 95,034 people in Federal prisons at the end of 1994, with 958,704 in state prisons. The total represented

### Will there be more prisoners than students in America?

an overall increase of 9 percent compared with 1993, which was the second largest yearly increase on record.

Allen J. Beck, an author of the report, said there were another 483,717 people locked up in city and county jails at the end of 1994. Most inmates in local jails at any given time are awaiting trial or have been sentenced to terms of a year or less.

There were widespread variations by region in rates of incarceration, the report found. Southern states had the highest per capita rate of incarceration, 451 per 100,000 residents, while the Northeast had the lowest rate, 285 per 100,000 residents. During 1994, Texas led the nation in the growth of its state prison population with an increase of 28 percent, followed by Georgia with a 20 percent increase.

The report offered conflicting evidence about whether many of those being arrested are simply drug users instead of serious, violent criminals, as some critics of America's crime policy have charged. The study showed that between 1980 and 1993, the number of people imprisoned for violent offenses grew by

221,200 nationwide, while those convicted on drug charges increased by 167,000.

But at the same time the report found that from 1980 to 1993 the percentage of drug offenders in state prisons rose to 26 percent from 8 percent, while the proportion of drug offenders in Federal prisons soared to 60 percent from 25 percent.

John J. DiIulio Jr., professor of politics and public affairs at Princeton University, said that the report had overlooked an important development: that violent criminals are gradually being made to serve a greater proportion of their sentences. In 1988, he said, violent offenders served only 43 percent of their sentences, compared with 51 percent today. "This is good news and will account for tens of millions of serious crimes averted," Professor DiIulio said.

But Jerome G. Miller, the director of the National Center on Institutions and Alternatives, said that today's report was discouraging because it showed that "the percentage of Americans going in and out of jails is phenomenal" and that "as you go down the socio-economic scale the percentage gets much higher." America, Mr. Miller asserted, is relying too heavily on imprisonment as a way to stop crime, and the criminal justice system is turning the majority of impoverished minorities in the inner cities into criminals.

Almost three quarters of the new admissions to prisons are now black or Hispanic, Mr. Miller said, and if present trends continue, he asserted, by 2010, "we will have the absolute majority of all African-American males between age 18 and 40 in prisons and camps."

Today's report, though not addressing the racial breakdown of new admissions to prison, confirms that between 1980 and 1993 the proportion of inmates in state and Federal prisons who were black rose to 50.8 percent from 46.5 percent, while the proportion of prisoners of Hispanic descent almost doubled to 14.3 percent from 7.7 percent.

"The effects of relying so heavily on the criminal justice system have not been looked at," Mr. Miller said, "but it explains a lot of things." When so many poor families have a father, brother, uncle or son who has been arrested at one time or another, Mr. Miller said, "it makes it very hard to organize them against the criminal element."

NY Times 8.10.95



Senator KENNEDY. Jerome Miller, the director of the National Center of Institutions and Alternatives, points out "Almost three-quarters of the new admissions to prisons are now black or Hispanic. If present trends continue," he asserted, "by 2010 we will have the absolute majority of all African-American males between 18 and 40 in prisons and camps. The effects of relying so heavily on the criminal justice system have not been looked at," Mr. Miller said, "but it explains a lot of things. When so many poor families have a father, brother, uncle, or son who has been arrested at one time or another," Mr. Miller said, "it makes it very hard to organize them against the criminal element"—a very powerful reminder about some of the things that are happening in our criminal justice system.

Just picking up what Senator Feinstein said about who is in prison, the Criminal Law Reporter points out:

A substantial number of drug law violators who are sentenced to incarceration in Bureau of Prisons custody can be classified as low-level. Using one set of criteria which limit offenders to no current or prior violence in their records, no involvement in sophisticated criminal activity, and no prior commitment, there were 16,000 Federal prisoners who could be considered low-level drug law violators. They constitute 36 percent of all drug law offenders in the prison system and 21 percent of the total sentenced Federal prison population. Among the low-level offenders, 42 percent were couriers or played peripheral roles in drug trafficking,

but they get caught up in the mandatory guidelines and get sentenced in these conspiracies.

Low-level drug law offenders are much less likely than high-level offenders to reoffend after they are released from prison. If they recidivate, they are unlikely to commit a crime of violence. Furthermore, length of incarceration does not positively or negatively influence their recidivism,

another point about what makes a difference.

You nail someone out on that local street who is a drug dealer. Does it happen that that space remains open, or do the market forces bring someone else in who is prepared to take that role? I think the point about it, at least as I understood it, about the increase of violence is that the violence is associated with crack cocaine because it is sort of a nonmature industry, so to speak—cheaper, more available in terms of unstable kinds of conditions. People are prepared to protect their turf and local gangs come in conflict—I don't know, Mr. Budd, whether you would agree—and as it becomes more mature and people stake out their areas and it becomes more settled, then we get less kinds of violence associated with it.

The guidelines provide that if you are going to have violence or guns involved in it, you are going to get the extra kick. But what you are trying to point out is with regard to the implications of these guidelines as it applies to both crack and powder, if we are just talking about the sentencing, there ought to be a fairer and more equitable way.

Mr. BUDD. I agree with that, Senator, certainly.

Senator KENNEDY. I am troubled that the Justice Department has had sort of a muted response to this whole problem. I am very hopeful, Mr. Chairman, that as time moves on and as we have to focus and sharpen our own thinking that we can bring them into it.

I know Mr. Goldsmith has talked about maybe not having uniformity in terms of it, but I don't know what is right, whether it is 2 or 3 or 4 or 5 times the penalty, or whatever it is, but I hope we can try, in an imperfect world, in the world in which all of us live of compromise, to at least come and find some common ground in this area because I think it is enormously important to try and do that.

I assume that none of you think that we ought to resolve this a different way by raising powder cocaine to where it is in crack?

Mr. CONABOY. No, there is no suggestion of that.

Senator KENNEDY. I would hope that perhaps you can, and we can, Mr. Chairman, try and get the Justice Department perhaps over the August recess and see if we can't find some common ground in this area rather than leaving this out there. Would I be correct, having seen the time go on, that you would welcome the opportunity to try and see if you could—

Mr. CONABOY. If we could play any role in that, we would be more than happy to do that, Senator.

The CHAIRMAN. That is a possibility and, frankly, I am wondering, too. There is a lot of heat on this issue. I mean, this is a very interesting hearing to me, and I think to anybody who is listening. There is a lot of heat on this issue and I am wondering if we shouldn't, as Congress, send you back to the drawing board because there are some things you haven't given consideration to.

I understand what you are trying to do. I understand you want it to be fair. On the other hand, these people are killing our kids. They are wrecking our communities, and it is largely the black community that is getting completely devastated by it. Frankly, I am really concerned about it and I am not sure that by bringing crack cocaine, which is a lot tougher drug, much more widespread, much more in demand, much more psychotropic—that by bringing the penalties down to the lower level of powder is the answer, but you have expressed a desire to try and work and resolve these matters.

It may be that we should send you back to reconsider and get Justice to work with you, and some of us, so we can come up with perhaps something that really will work.

Mr. CONABOY. We were frustrated, Senator—

The CHAIRMAN. I can see that, and we are, too.

Mr. CONABOY [continuing]. During our hearings, we weren't presented with any alternative and the reasons for it. Now, Commissioner Goldsmith has done some work on that, but as I said, it is a frustrating problem and the question of having a ratio in it does bring out a very dramatic question as to whether or not a ratio can be implanted into the law with assurance that it is going to be administered fairly. I don't want to impugn anybody, the Justice Department or any U.S. attorney, but we have to be realistic and look at what is happening out there.

The CHAIRMAN. Well, I sure as heck don't want the wrong message sent out there.

Mr. CONABOY. And we agree with that.

The CHAIRMAN. I am afraid the Commission's report sends the wrong message. I listened carefully to Mr. Goldsmith. I have respect for each of you. Mr. Goldsmith made—

Senator FEINSTEIN. Mr. Chairman?

The CHAIRMAN. Yes?

Senator FEINSTEIN. I just want to say that if they are going to take another look at it, what would be really useful is to take a look at the actual cases that have been convicted and sentenced under Federal law, see what the actual nature of the crime is, assess the prior criminality, assess the amount involved, and then I think you can make some determination as to the fairness of the laws. But without that, I think it is very difficult.

The CHAIRMAN. That is right. I was listening to Mr. Goldsmith and he made some pretty compelling arguments that there needs to be some sort of ratio, maybe not 100-to-1, but there certainly needs to be a higher ratio for crack cocaine.

Let me just turn to this chart over here because this is a telling chart and it is from your own statistics. This particular chart demonstrates that the number of blacks under age 21, small-time crack offenders with no prior criminal history, no weapons involvement, sentenced in Federal court was just 48 in 1994. Now, maybe we should work on that, but a very small level of the total numbers that were convicted. The overwhelming majority were not young, were not first-time offenders, and were not low-level offenders. Now, this comes right from the U.S. Sentencing Commission.

Senator KENNEDY. Mr. Chairman, what is "Other" on there?

The CHAIRMAN. That means anybody over 21 years of age who—

Mr. CONABOY. That probably comes from our own records.

The CHAIRMAN. It is all other crack offenders.

Mr. CONABOY. We are the repository of all those records, so I am sure we have those, but I don't know exactly what—

Senator KENNEDY. Is "Other" nonblack or minority, or is it—

The CHAIRMAN. It includes everybody who was sentenced in 1994.

Senator KENNEDY. Well, I don't understand. If the others are black, as well as the smaller numbers are black, all this would show is that younger people are getting convicted rather than older people, and I don't understand the significance of it, when we are talking about powder and crack, that there are some older blacks that are getting nailed under that.

The CHAIRMAN. Well, that is right, but there has been some testimony here today that this has been disproportionately bad for low-level minority crack defendants, and the fact is there are only 48 that you would consider in that category, at least as we interpret those statistics.

Mr. CONABOY. Well, that is in one single category.

The CHAIRMAN. Yes.

Mr. CONABOY. In other words, it is very dangerous from the standpoint of trying to really hit a resolution that everybody can agree on to take singular categories because we are not sending many altar boys to jail. There is no question about that, but most of the crack dealers don't fall in that category.

The CHAIRMAN. Right.

Mr. CONABOY. It may be true that there is only a small number who were never in trouble before and have perfect records and

played a very minimal role, but that is not the average type of person who is being convicted here.

The CHAIRMAN. I understand, but the 1994 crime bill safety valve takes care of the people who are——

Mr. CONABOY. Some of it does, yes.

The CHAIRMAN [continuing]. The low-level, basically nonviolent people. We tried to do that in that bill. Maybe we need to break down even that chart because of some of the questions raised here, but nevertheless the chart still is startling.

Mr. CONABOY. And we do have some more extensive breakdown, Senator, than that.

The CHAIRMAN. Well, as you can see, we are upset. We don't think that bringing crack cocaine sentencing down to powder is the answer. It is the wrong message. Our inner cities are being devastated by this and crack usage is going up. Yet, you point out some disparities that really may be unjust. Well, we ought to work on that, but by gosh, I sure don't think bringing it down to the level of powder cocaine is the way to do it. We will have to maybe help you with a determination here in the committee on whether we should send you back to the drawing board.

Yes, Mr. Budd?

Mr. BUDD. If we do, in fact, go back to the drawing board, as the Senator suggests, we would like to take a closer look at this because while this may have been made from our statistics, it is not our chart.

The CHAIRMAN. I agree with that.

Mr. BUDD. The quick answer is that the only thing we can determine is that 48 people under the age of 21 were convicted as low-level minority crack defendants in 1994, but we are not even sure what is meant by this particular item as to low level.

The CHAIRMAN. Well, let's look at it and see if we can get better statistics.

One last thing. You indicated, Judge Conaboy, that you thought—and you implied this, although you didn't give a percentage, Mr. Budd—that there are about 51 percent of crack users who are white. I have been led to believe it was around 10 percent.

Mr. CONABOY. No; the information——

The CHAIRMAN. Do you have any statistics you base that on, because I would like to know that?

Mr. BUDD. We can supply that for you.

The CHAIRMAN. Will you supply that for us?

Mr. CONABOY. That was one of the statistics.

The CHAIRMAN. Yes; I was surprised at that.

Mr. CONABOY. We were all surprised at that.

The CHAIRMAN. So I would like to know that, and that would play a significant role in any discussion on this. So if you could provide that to us, because I have always been led to believe it was about 10 percent.

Mr. CONABOY. We will do that.

The CHAIRMAN. I have no desire to support that figure. It is just that is what I have been led to believe.

Mr. CONABOY. We will supply the information on that, Senator.

The CHAIRMAN. All right. Well——

Senator KENNEDY. Mr. Chairman?

The CHAIRMAN. Senator Kennedy?

Senator KENNEDY. I want to thank you very much. Maybe there are those that think we have to keep going back to the drawing board. I am personally convinced based upon both this panel and the excellent report that you have got that we have the information to make the judgment. Maybe we can't go all the way down to the equivalence in terms of the powder, but we all agree that the current disparity is enormously unfair in its implementation.

All we have to do is go back and realize where we got the 100-to-1. I mean, that wasn't based upon any hearings. That wasn't based upon information. That wasn't based upon law enforcement people testifying. That was in the rush after Len Bias' tragic death in 1986. Tip O'Neill introduced that. The majority leader said 20-to-1 at that time. That was President Reagan's position. So we had a number of different bills with all different positions on it.

The one thing, I think, that is pretty uniform is that the 100-to-1 makes absolutely no sense. I think we all have to be careful around here on the whole question of sentencing because there is an awful lot of rhetoric that is wrapped up into it, and I think the value of having men and women who have been out there in the courtroom dealing in tough-minded ways as judges, as thoughtful students, and as prosecutors—Wayne Budd has put more people behind bars who have been drug dealers and has more experience in this, and as far as I am concerned, I don't need a lot more studying when he comes and testifies with his background and experience.

So I just want to indicate that I am impressed by the work. I think it was courageous. I think it was fair. I think one of the principal reasons for establishing the Sentencing Commission was to give people a sense that sentencing was going to be fair and just. There are a lot of aspects of our criminal justice system that we have to give focus and attention on, but what we were trying to do is make sure that sentences, to the extent that we could, were going to be fair and just in this area.

I think that what you have done in terms of this kind of an issue has a clear reflection that not only do we want to make sure that the action and the legislation is going to be fair and just across the society, but the results are going to be, and they are not with regard to this particular kind of challenge and I think we have some real responsibility to try and address it.

I want to thank you all very much for your testimony. I thank you, Mr. Chairman. I also want to thank you, Senator Hatch, for having the hearing. I think it has been really very important and has been enormously informational.

The CHAIRMAN. Well, thank you, Senator. I agree, and I agree that the three of you are great, but remember this was a 4-to-3 decision. This wasn't exactly a unanimous decision, and I think there are a lot of people out there who look at the other side of the equation, and that is these people are killing our kids. These people are disrupting society. These people are wrecking our society, and these people are going up in numbers every year in convictions, and so forth. The question is do we send the right message by bringing crack cocaine, which everybody admits is a worse drug,

down to the level of powder cocaine. I personally don't believe that is the way to go.

For this chart, I have been told that low-level means under 50 grams of crack, and 50 grams of crack, of course, is around 500 to 1,000 dosages, or rocks, as they call it in the business.

Mr. CONABOY. Senator, a lot of people don't realize some of the things we do at the Commission, but we monitor every sentence in every Federal court in the country and we keep a large group of statistics on every sentence. We would be glad to furnish you all of those statistics to answer those questions.

Senator FEINSTEIN. Mr. Chairman?

The CHAIRMAN. Yes, Senator Feinstein?

Senator FEINSTEIN. Let me just say once again, because, as you have, Judge, I have worked on Sentencing Commissions as someone who has sentenced people convicted of felonies, until you really examine the cases and the specific nature of the cases, I must just tell you, in my view, at least, the findings are very vulnerable.

What you are, in essence, saying is that the Federal system is unfairly targeting some low-level minority crack people. I don't believe that is true.

Mr. CONABOY. We are not saying that, in total. We are not emphasizing the low level as much as the fact that the impact is overall, across the board, more severe on the poor and black areas, whether they are low- or high-level.

Senator FEINSTEIN. All I am saying is before you say that, take a look at the cases themselves. Then if you have examined the cases themselves, I think the findings have a lot more validity than they do if you just base them on race alone. That is my point.

Mr. CONABOY. Yes, we can agree with that, and we can give you those statistics. We have that in our bank of information. But the bottom line is it is the overall picture—that while there are a lot of higher level people in those statistics, it is the dramatic difference that just sticks out there like a sore thumb.

The CHAIRMAN. But maybe it is because that is what is happening.

Mr. CONABOY. That could be.

The CHAIRMAN. The point is, you know, I don't want to miss the point that we are dealing with the people who are doing these things.

Mr. CONABOY. That could be.

The CHAIRMAN. You knew, I don't know that skin color should even enter into it from that standpoint because if they are doing this, we can't just say, well, you know, we don't want to look like we are picking on black people. I think the inner-city black folks I know, the African-Americans I know who go to church on Sunday and are trying to live and work and do the things they can to be substantial citizens in our society, want us to do something here. They want us to clean up these cities. Frankly, I am concerned about it, but I know you are, too, so I am not trying to find fault with any of you.

Mr. CONABOY. If I could just make one final comment along those same lines, we do agree with that, and I think that the guidelines system that is now in effect in the Federal system—it gets a lot of complaints and a lot of abuse, but one thing for sure about it, it

does impose severe sentences on the most culpable, and I think that is right. I think it should. That is what it is supposed to do.

The CHAIRMAN. Well, thank you all. We appreciate your being here. We appreciate the efforts and the time that you have given to us today.

Mr. CONABOY. Thank you.

The CHAIRMAN. Our last two witnesses will be Mr. Reuben Greenberg, Chief of Police of the Charleston Police Department, from Charleston, SC, and Dr. Arthur Curry of the State of Maryland. So we are happy to have both of you here and we look forward to taking your testimony.

Do you think you could keep your statements pretty much close to about 5 minutes?

Mr. CURRY. Absolutely.

The CHAIRMAN. If you would, because I have run out of time and I don't want to short-change you. We will put your full statements in the record, and we will pay strict attention to them as well.

Mr. Greenberg, we will turn to you first.

**PANEL CONSISTING OF REUBEN GREENBERG, CHIEF OF POLICE, CHARLESTON, SC; AND ARTHUR CURRY, SILVER SPRING, MD**

**STATEMENT OF REUBEN GREENBERG**

Mr. GREENBERG. Thank you very much. I would like to thank the members of the Senate Judiciary Committee for giving me the opportunity to present my remarks here this morning.

I am particularly happy to have been invited to testify regarding the sentencing of persons convicted of violating the narcotics law of the United States. Specifically, I would offer my opinion with respect to different sentencing guidelines for persons convicted of possession and/or distribution of the drug commonly referred to as cocaine. Unlike some of the others previously, my remarks will be related to the practical and operational aspects of cocaine enforcement from a law enforcement perspective.

As you know, cocaine is a drug that is classified as a stimulant and is associated with contributing to certain medical and psychological behavioral effects. Currently, the penalties and sentencing guidelines for conviction of possession or sale of powdered cocaine are somewhat less than for those convicted for possession or sale of the processed form of powdered cocaine, commonly referred to as crack cocaine.

As I understand it, there are no meaningful pharmacological differences between powdered cocaine and so-called crack cocaine. Crack cocaine is nothing more than a further processed form of powdered cocaine, and the two are distinguished from each other only by the means of administering the drug into the body.

This drug, when used alone as a powder, is administered by inhaling the drug directly into the nostrils where it is able to be introduced into the bloodstream through the mucous membranes, or it can be administered directly into the bloodstream in a semiliquified form by inserting the drug via a hypodermic syringe. Both of these means of introducing the drug into the body have been used, of course, for many decades.

The more natural form and, of course, the most historical means of administering the drug has been, as the Andean Indians have, to chew the leaves of the coca plant itself in order to obtain its effects. However, processing cocaine or extracting the active ingredient from the coca leaf into any of its processed forms produces a more convenient and, depending upon the mode of injection, a more intense effect of the drug.

Recently, powdered cocaine has been further processed in a manner to make it more suitable and to disguise it as a rock or hardened form of the drug that can be inserted into tobacco and can be smoked. There is no question that the extent that the drug has been processed and how it is introduced into the body can significantly increase its intensity, assuming that it is not introduced contemporaneously with other drugs, such as alcohol, heroin, various forms of the amphetamines, marijuana, morphine, or other legend drugs.

The physical effect of the drug in any of its forms can result in significantly increased stimulation, greatly reduced inhibition, accelerated heart rate, higher blood pressure, loss of memory, and inability to concentrate or maintain sufficient focus to operate mechanical or technological devices.

In addition to these effects, the drug can have a different and unpredictable effect upon an individual depending upon the body chemistry of that particular person, the prior medical conditions, and that person's psychological predisposition. All of the forms and means of ingestion of this drug can result in any combination of the above effects.

According to officials of the city of Charleston police forensics laboratory and the Charleston County medical examiner's office, there is no accurate way to determine how the drug is administered simply by finding specific traces of the drug in the bloodstream. Or to put it more simply, as the drug exists in the body, it is difficult to determine any differences between powdered cocaine and the so-called crack cocaine. Depending upon the quantity of the drug in the bloodstream or the urine or the body tissues, one might assume under certain circumstances that the drug was administered in a particular way.

Using tobacco as a comparison substance for purposes of illustration only, perhaps one could say that powdered cocaine could be the counterpart of snuff or chewing tobacco and crack cocaine to be a counterpart of smoking tobacco. Whereas the smoking of tobacco in order to receive its nicotine produces a more intense and immediate short-term stimulating effect than chewing tobacco, so it is that crack cocaine can produce a more intense and immediate effect of shorter duration than that produced by powdered cocaine. I would like to stress, however, that individual medical conditions and body chemistry can either enhance or diminish cocaine's effect on a given occasion.

Since it is extremely difficult to detect any differences between crack cocaine and powdered cocaine as it exists in the bloodstream, there appears to me to be no reason to legally differentiate between the means in which the drug is introduced into the body. It would be no more prudent to make this distinction with respect to cocaine than it would be to set drunk driving penalties by differentiating



between whether or not the drunk driver became intoxicated by guzzling beer or by having one or more shots of whisky. As with cocaine, even when alcohol is detected in the blood or urine, it is not possible to determine whether or not the user's preferred means of intoxication was via whisky or wine.

It is for all of the above practical reasons why I find no justification for maintaining a greater level of sentencing for those persons convicted of the sale or possession of crack cocaine as compared with powdered cocaine. Indeed, it can be effectively argued that cocaine that is injected by means of a hypodermic syringe is the most dangerous means of administering the drug and that certain health considerations arise, such as hepatitis and AIDS contamination, which do not arise with respect to administering the drug in other ways.

I would therefore propose that, logically, not only crack cocaine and powdered cocaine be treated identically in a legal sense, but that the penalty for possession or sale of powdered cocaine be increased to equal that of the possession or sale of crack cocaine. Increasingly penalties for violation of the law can unquestionably deter or otherwise provide strong deterrence against violating specific laws. Stiff penalties with respect to sentencing in certain instances can and have helped to prevent crime by those who would have engaged in experimental drug use in the absence of penalties sufficient to deter this activity.

I would add my voice to those who would opt to equalize the penalties for all cocaine use, but to do so by increasing the penalties for powdered cocaine rather than reducing the penalties for crack cocaine. I am convinced that adequate justification exists to adopt this course of action. Indeed, there appears to be no reason to do otherwise.

It is often argued that crack cocaine is a drug preferred by those persons who have the least to lose by illegal drug use of various kinds. It seems to me that if this is the case, those with the most to lose could perhaps easily, and perhaps more effectively, be deterred by an increased penalty. Rather than reducing the penalties for those disaffected persons in our society, we should instead be equalizing the penalties for all by raising the penalties for those with the most to lose. Overall, I believe that in the end there would be far fewer drug law violators.

Finally, let me say that in light of the recent spectacular successes of the Colombian Government and the law enforcement officers in that country in apprehending the very highest level Colombian drug dealers, it would seem to me that lowering or reducing the penalties for cocaine distribution would not only be poorly timed and insensitive to the suffering and atrocities committed against Colombian judges, police officers, and prosecutors, but it would also send exactly the wrong message to both the Colombian and our own domestic drug dealers and cause our own allies in the drug war to assume that we are retreating just as they are beginning to advance in their war against global drug trafficking.

I would like to thank you very much for listening to my remarks. The CHAIRMAN. Thank you, Chief Greenberg.

[The prepared statement of Mr. Greenberg follows:]

## PREPARED STATEMENT OF REUBEN M. GREENBERG

Ladies and Gentlemen, and Honorable Members of the Senate Judiciary Committee: I am happy to have been invited to appear before you today to offer testimony regarding the sentencing of those persons convicted of violating the Narcotic Laws of the United States. Specifically, I will offer my opinion with respect to the different sentencing guidelines for persons convicted of possession and/or distribution of the drug commonly referred to as cocaine.

As you know, cocaine is a drug classified as a stimulant and is associated with contributing to certain medical and psychological and behavioral effects. Currently, the penalties and sentencing guidelines for conviction of possession/sale of powdered cocaine are somewhat less than for those persons convicted of possession/sale of the processed form of powdered cocaine commonly referred to as crack-cocaine.

As I understand it, there are no meaningful pharmacological differences between powdered cocaine and the so called crack-cocaine. Crack-cocaine is nothing more than a further processed form of powdered cocaine and the two are distinguished from each other only by the means of administering the drug into the body. This drug, when used alone as a powder, is administered by inhaling the drug directly into the nostrils where it is able to be introduced into the blood stream through the mucous membranes, or it can be administered directly into the blood stream in a semi-liquefied form by inserting the drug via a hypodermic syringe.

Both of these means of introducing the drug into the body have been used for many decades. The more natural form and most historical means of administering the drug has been to chew the leaves of the coca plant itself in order to obtain its effects. Processing cocaine or extracting the active ingredient from the coca leaf into any of its processed forms produces a more convenient, and depending upon the mode of injection, a more intense effect of the drug.

Recently, powdered cocaine has been further processed in a manner to make it more suitable and to disguise it as a "rock" or hardened form of the drug that can be inserted into tobacco and can be smoked.

There is no question that the extent that the drug has been processed and how it is introduced into the body can significantly increase its intensity, assuming that it is not introduced contemporaneously with other drugs, such as alcohol, heroin, various forms of amphetamines, marijuana, morphine, or other legend drugs. The physical effect of the drug in any of its forms can result in significantly increased stimulation, greatly reduced inhibition, accelerated heart rate, higher blood pressure, loss of memory, inability to concentrate or maintain sufficient focus to operate mechanical or technological devices. In addition to these effects, the drug can have a different and unpredictable effect upon an individual depending upon personal body chemistry, prior medical conditions and psychological predisposition. All forms and means of injection of this drug can result in any combination of the above effects.

According to officials of the City of Charleston Police Forensics Laboratory and the Charleston County Medical Examiners Office, there is no accurate way to determine how the drug was administered simply by finding specific traces of it in the blood stream; or to put it more simply, as the drug exists in the body, it is difficult to determine any differences between powdered cocaine and the so called crack-cocaine. Depending upon the quantity of the drug in the blood stream, urine or the body tissues, one might assume, under certain conditions, that the drug was administered in a particular way.

Using tobacco as a comparison substance for purposes of illustration only, perhaps one could say that powdered cocaine could be a counterpart of snuff or chewing tobacco and crack-cocaine could be a counterpart of smoking tobacco. Whereas the smoking of tobacco, in order to receive its nicotine effect, produces a more intense and immediate, short term, stimulating effect than chewing tobacco, so it is that crack cocaine can produce a more intense and immediate effect of shorter duration than that produced by powdered cocaine. I would like to stress, however, that individual medical conditions and body chemistry can either enhance or diminish cocaine's effect on a given occasion.

Since it is extremely difficult to detect any difference between crack-cocaine and powdered cocaine as it exists in the blood stream, there appears to be no reason to legally differentiate between the means in which the drug is introduced into the body. It would be no more prudent to make this distinction with respect to cocaine than it would to set drunk driving penalties differentiating between whether or not the drunk driver became intoxicated by guzzling beer or having one or more shots of whiskey, as with cocaine, even when alcohol is detected in the blood or urine, it is not possible to determine whether or not the users preferred means of intoxication was whiskey or wine.

It is for all the above practical reasons why I can find no justification for maintaining a greater level of sentencing for those persons convicted of sale/possession of crack-cocaine as compared with powder cocaine. Indeed, it can be effectively argued that cocaine that is injected by means of a hypodermic syringe is the most dangerous means of administering the drug in that certain health considerations arise such as hepatitis and AIDS contamination which do not arise with respect to administering the drug in other ways.

I would, therefore, propose that, logically, not only that crack-cocaine and powdered cocaine be treated identically in a legal sense, but, that the penalty of possession/sale of *powdered cocaine* be increased to equal that of the possession/sale of *crack cocaine*. Increasing penalties for violations of the law can unquestionably deter or otherwise provide strong deterrents to violate specific laws. Stiff penalties, with respect to sentencing in certain instances, can and have helped to prevent crime by those who would have engaged in experimental drug use in the absence of penalties sufficient to deter this activity.

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Finally, let me say that in light of the recent spectacular successes of the Colombian Government and Law Enforcement Officials in that country in apprehending the very highest level Colombian drug dealers, it would seem to me that lowering or reducing the penalties for cocaine distribution would not only be poorly-timed and insensitive to the suffering and atrocities committed against Colombian Judges, Police Officers, and Prosecutors, but would send exactly the wrong message to both Colombian and our own domestic drug dealers, and cause our own allies in the drug war to assume that we are retreating just at the time they are advancing.

Thank you for your courtesy in listening to my remarks.

The CHAIRMAN. We will turn to you, Dr. Curry.

### STATEMENT OF ARTHUR L. CURRY

Mr. CURRY. Thank you, Mr. Chairman. Again, I appreciate the opportunity to testify before the committee today.

I consider it extremely significant that you understand first why I am not here. It is not my intent to point fingers or criticize judges or prosecutors, nor to mock the judiciary system of this country. My sole purpose today is to present my son's case and put a face behind the problem as an example of why we must rethink the 1986 Anti-Drug Act in general, and specifically the disparity that exists between powder and crack cocaine sentencing.

In passing this act, we have forced prosecutors to demonstrate their toughness on drugs and drug offenders by the number of convictions they get. This has meant in many cases referring cases normally heard in State courts to Federal courts, changing trials to more favorable locations for conviction, and using minor participants in an undercover capacity relative to other criminal investigations.

I must admit to you that I am frustrated and sometimes angered by a democratic system that I defended and promoted as a soldier in Vietnam, as an educator, as a parent, and a black male in America. I was raised to believe that the system worked for everyone, regardless of race, gender, age, or religion. Now, I see that this

very system has dealt very inequitably with young black men, my son being one of them.

My son, Derrick Curry, was arrested on December 5, 1990, at the age of 19 and charged with one count of possession with intent to distribute crack cocaine, one count of distribution of crack cocaine, and one count of conspiracy to distribute. He is the youngest of three children, my only son. His oldest sister is an accountant, his other sister a recent graduate of Carnegie-Mellon in Pittsburgh.

A complete background check was done by the FBI and no evidence was found to support any contention that he was a major drug dealer. In fact, one of the FBI agents described him as a flunky, a mule, caught up in the activities involving his particular community. He had no automobile other than an old Citation that belonged to his mother. He had no money in the bank and, like most college students, he borrowed money occasionally from his mother and myself to put gas into that automobile. He was enrolled in college and working toward a degree in, of all things, criminal justice.

The FBI conducted an investigation involving 28 individuals over a 5-year period. By the prosecutor's own records, my son was determined to be a minor, flunky participant who was only involved the final 6 months of the investigation. During the ensuing months, he was offered a plea agreement which called for him to plead guilty and, in return, receive a 15-year sentence.

The prosecutor in that particular case indicated, because of his low level and minimum participation, he had no information to give, but it was one way of disposing of that particular case. My son decided not to plead and accepted the jury verdict.

I want to make it perfectly clear that my son had his day in court. He was found guilty. I have no problem with that at all. But as a result of that, what I do have a problem with is, as a result of being a minor participant in this particular case, he is now serving a sentence of 19 years and 7 months as a first-time, nonviolent offender; never even been suspended from school before.

I think that in many instances when we read the newspapers, we see that in many instances where cases go, what kind of treatment you get, is left up to the prosecutor handling that particular case. I pleaded with the Federal prosecutor to allow that case and a couple of other cases to go forward into State court, and the answer that I received was that this was impossible, that Americans wanted them to be tough on crime, and that is what they were, in fact, doing.

In an effort to convince you of the disparity between powder and crack cocaine, I wish to offer the following. Is the penalty greater for killing someone with a handgun or shotgun? Is the penalty greater for killing someone with a gun or with a knife? Is the penalty for bombing a building dependent upon the type of explosives that are used? Is the penalty for vehicular manslaughter greater when one is intoxicated on beer or whisky? How would you react if the law for vehicular manslaughter was punishable 100 times greater if you were intoxicated on a martini?

You see, this is perhaps the heart of the matter. Martinis are to powder cocaine as rot gut whisky is to crack. It is truly a matter of affordability, of economics, of rich versus poor. We will rarely punish the true kingpin, given this particular scenario.

My son will spend roughly as long in prison as he has been alive. Such a sentence for a first-time, nonviolent offender is astounding not because it is unusual, but because by any standards it is incomprehensively severe. It is nearly two times the prison sentence served by most murderers in this country. It is four times the prison sentence served by most kidnappers. It is five times the prison sentence served by most rapists. It is 10 times the prison sentence served by most who illegally possess guns.

As previously stated, my son was sentenced to 19 years, 7 months. By the same token, if the ratio had been 1-to-1, his sentence would have been slightly over 5 years. At a 5-to-1 ratio, his sentence would have been a little over 7 years. In some cases, making the example, that is 14 years' difference in what he received and what he would have gotten had the ratio been different. That is a lifetime to a lot of young men in this particular country.

Again, I want to thank you for the opportunity to give you my particular views concerning this subject, and it is my hope that this committee will consider seriously the ratio of 1-to-1. However, I am a realist and I understand the politics of the time, and I understand that there is always another side, but certainly I think we all can agree that 100-to-1 just is very, very unfair.

Thank you again.

[The prepared statement of Mr. Curry follows:]

#### PREPARED STATEMENT OF ARTHUR L. CURRY

Members of the Senate Judiciary Subcommittee on Crime: Please allow me to thank you for this opportunity to testify before your committee.

I consider it extremely significant that you understand first why I am not here. It is not my intent to point fingers or criticize judges and prosecutors, nor mock the judiciary system of our country. My sole purpose today is to present my son's case to you as an example of why we must rethink the 1986 Anti-Drug Abuse Act in general and rethink specifically the disparity that exists between "powdered" and "crack" cocaine sentencing.

In passing this Act, we have forced prosecutors to demonstrate their toughness on drugs and drug offenders by the number of convictions they get. This has meant, in many cases, referring cases normally heard in state courts to federal court, changing trials to a more favorable location for convictions, and using minor participants in an undercover capacity relative to other criminal investigations.

I must admit to you that I am frustrated and sometimes angered by a democratic system that I defended and promoted as a soldier in Vietnam, as an educator, as a parent, and as a Black male in America. I was raised to believe that this system worked for everyone, regardless of race, gender, age, or religion. Now I see that very system dealing inequitably with young Black men—my son being one of them.

My son, Derrick A. Curry, was arrested on December 5, 1990, at the age of nineteen and charged with one count of possession with intent to distribute crack cocaine, one count of distribution of crack cocaine, and one count of conspiracy to distribute crack cocaine. He is the youngest of three children and my only son. His oldest sister is an accountant and his other sister is a recent graduate of Carnegie-Mellon in Pittsburgh.

A complete background check was done by the F.B.I. and no evidence was found to support any contention that he was a major drug dealer. In fact, he was labeled a flunky by one FBI agent. He owned no car; he drove an old Citation that belonged to his mother. He had no money and like most college students routinely borrowed gas money from his mother and myself. He had no jewelry. He had no arrest record nor any involvement with the law prior to this incident. He had never even been suspended from school. On the other hand, despite having an I.Q. of 80, he was a second year student at Prince George's Community College working toward, of all things, a degree in Criminal Justice.

The F.B.I. had conducted an investigation involving twenty-eight individuals for over five years. By the prosecutors own records, my son was determined to be a minor participant who was only involved the last six months of the investigation.

During the ensuing months, he was offered a plea agreement which called for him to plead guilty to the conspiracy count and agree to work in an undercover capacity in connection with other criminal investigations in addition to other terms and conditions. In exchange, it would be recommended to the court that he be sentenced to 15 years. My son turned down the plea agreement for two reasons. He did not feel that he was guilty and he did not want to work undercover.

Federal prosecutor Jay Apperson in his commentary "What Prosecutors Know: Mandatory Minimums Work," *Washington Post* newspaper, February 27, 1994, best describes the subjective practices that exist when comparing the Angela Lewis case with Derrick's case. Lewis was sentenced to ten years for her involvement in drug trafficking when she failed to cooperate with prosecutors. After deciding to cooperate, she served only 18 months. Derrick was offered a chance to cooperate with the prosecutors—not in exchange for 18 months but in exchange for 15 years and undercover work. Does fairness, justice, and equality of the law depend solely on the prosecutor one receives? Does cooperation lead to the truth or does it merely encourage saying anything to please the prosecution to receive a reduced sentence?

Because of the large number of individuals involved and other legal implications, Derrick was tried separately. He also was the only one of the original 28 defendants found guilty of conspiracy. One can't help but wonder with whom did he conspire?

Derrick was sentenced on October 1, 1993, to nineteen years and seven months. He is not eligible for parole. He will be forty years old when he is released.

I must admit to you that I too sat and watched former President Bush address the nation on the drug problem. Without the facts, I too believed that crack was the worst evil to confront our nation—that something had to be done. Now we have the facts and something still must be done. With the facts, how can the penalty for crack be 100 times greater than that of powdered cocaine—especially when this disparity so negatively impacts Black youth over white. You need only to visit any prison to see for yourself the next generation of young Black males locked behind bars.

In an effort to convince you to eliminate the disparity between "powdered" and "crack" cocaine, I wish to offer the following:

- Is the penalty greater for killing someone with a handgun or shotgun?
- Is the penalty greater for killing someone with a gun or knife?
- Is the penalty for bombing a building dependent upon the type of explosive used?
- Is the penalty greater for vehicular manslaughter when one is intoxicated with beer or whiskey?
- How would you react to a law if vehicular manslaughter was punishable 100 times greater if you were intoxicated on martinis?

You see, this is perhaps the heart of the matter—martinis is to powder cocaine as "rot gut" whiskey is to crack. It is truly a matter of affordability, of economics, of rich versus poor. We will rarely punish the true kingpin given the present laws.

My son will spend roughly as long in prison as he's been alive. Such a sentence for a first time, nonviolent offender is astounding, not because it is unusual, but because, by any standards, it is incomprehensibly severe.

- It is nearly two times the prison sentence served by most murderers in America.
- It is four times the prison sentence served by most kidnappers.
- It is five times the prison sentence served by most rapists.
- It is 10 times the prison sentence served by those who illegally possess guns.

As previously stated, my son was sentenced to nineteen years, seven months as a first time, nonviolent minor offender. If he had been convicted on the same charges for powdered cocaine, his present sentence would have been five years—a fourteen year difference—a lifetime for a young man.

Mr. Chairman, I am as Republican as most Republicans; however, I can not support this grave injustice. My entire career has been devoted to law and order, but I have always insisted that the punishment fit the crime.

I thank you for this opportunity to speak and remain hopeful that crack and powder cocaine will be sentenced on a one to one ratio and that it will be made retroactive. I ask this not just for my son, but for justice and equity for all young people.

The CHAIRMAN. Well, thank you, Dr. Curry. You are certainly a distinguished school principal and a veteran, and we have respect for you and I feel really badly about your son.

I did ask the FBI about the details of your son's incarceration and they said that he was identified early on in an investigation of a drug dealer, a major crack dealer named Norman Brown, that he was videotaped and audiotaped making crack deliveries, including one delivery of 500 grams, roughly 20,000 rocks or dosages—that was only one of the deliveries—and that they did offer him a chance to cooperate after the take-down, but he refused to take that opportunity.

I have to say I appreciate the anguish you have. You are clearly a very fine man and I worry about these types of things, but your son was videotaped and audiotaped making a series of deliveries of drugs, repeated crack deliveries, including one delivery of 500 grams, or roughly 10,000 to 20,000 rocks or doses, and that was only one transaction. The FBI says your son refused a plea bargain agreement where he might have gotten a lesser penalty and opted to go ahead and take whatever he got.

But, you know, you make one point that is extremely important and I agree with you on it, and that is that it is pathetic that people who commit murder or commit crimes with the use of guns, and so forth, get lesser penalties than some of these people who deal in drugs. Personally, I think the dealership of drugs and the distribution of crack cocaine ought to be dealt with severely, but there is no use kidding. The average death penalty in this country is only 15 years. The average rape sentence is 8 years and they serve maybe 2 years. We have got to change that, and that is one thing that we tried to do in last year's crime bill.

I do anguish with you over your son. I feel bad about it, but it is the desire by society as a whole to get tough on what is going on and try to get it cleared up. But, you know, I agree we need to look at these guidelines and work as best we can to make them as just as we can.

Mr. CURRY. With all due respect, some of the information you provided for me today was news. My son was only charged and videotaped, to my knowledge, on one occasion and he was driving an automobile that did have half a kilo of crack cocaine underneath the passenger seat.

The CHAIRMAN. Right.

Mr. CURRY. That is the only information that I have received from the FBI and was presented at trial.

The CHAIRMAN. Well, these are facts the FBI gave us, and as a Senator sitting here and as the father of three sons and three daughters, I share your anguish, I really do, and we are honored that you would take time to come and chat with us and I understand what you are saying.

Mr. CURRY. Thank you.

The CHAIRMAN. Chief, I understand what you are saying, too. You have had a lot to do with breaking down some of these syndicates that have been selling cocaine. It is very difficult to do, and once you break them down, somebody else pops up. Isn't that the way it is?

Mr. GREENBERG. Generally, sir, that is correct.



The CHAIRMAN. And your attitude is, if I understood your testimony correctly, that you would increase the penalties on powder cocaine upwards to those of crack cocaine?

Mr. GREENBERG. Yes, sir, and that is for very simple reasons. One of the tremendous benefits that we have with the sentencing guidelines in Federal court is in most cases they are indeed more stringent than those of State courts, at least in South Carolina. So, consequently, individuals who are arrested, and we have evidence relating to their conviction for possession of a wide variety of different types of drugs, will choose to plead guilty in State court because that same evidence, just as strong, would be presented in Federal court and the penalties would be much greater.

We see that as a benefit, and it makes the criminal justice system move much more swiftly. The person who wisely makes that choice would be enhanced, and that choice is not an easy one in South Carolina. We have stiff penalties there as well, but not quite as stiff as in the Federal system.

The CHAIRMAN. Yes.

Mr. GREENBERG. But the main thing I wanted to point out is that from a police standpoint, with respect to everything from drunk driving to domestic violence, suicide, child abuse, child abandonment, sexual assault, assaults on police officers, and others, there is really little difference from our viewpoint with respect to those individuals who have powder cocaine as opposed to those that are under the influence or in possession of crack cocaine.

We recognize that there are some differences in a social sense, but we are not social workers. Our work is within law enforcement, and a person who abuses his child because of being induced by ingestion of the drug in whichever way he decides to do so is of little consequence to us or to his victim.

The CHAIRMAN. You bet. Well, I think this hearing has been very beneficial. I hope we can move on from here and help to solve this set of problems a little bit better.

With that, we will recess until further notice.

[Whereupon, at 1:03 p.m., the committee was adjourned.]





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